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Supreme Court, U.S.
FILED

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NO. _____ OFFICE OF THE CLERK

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

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DAVID M. ARMSTRONG, et al.,
Petitioners,

v.

MARTIN MARIETTA CORPORATION, et al.,
Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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145 pp

QUESTION PRESENTED

WHETHER THE EN BANC COURT BELOW ERRED BY JUDICIALLY OVERRULING FEDERAL RULE OF CIVIL PROCEDURE 54(b) BY HOLDING THAT THE DISMISSAL OF FEWER THAN ALL THE PARTIES PLAINTIFF IN AN ON-GOING LAWSUIT RESTARTED THE STATUTE OF LIMITATIONS FOR THE DISMISSED PARTIES, EVEN THOUGH THE UNEQUIVOCAL AND EXPRESS LANGUAGE OF RULE 54(b) STATES THAT (1) THE RIGHTS OF THE DISMISSED PARTIES ARE NOT TERMINATED UNTIL FINAL JUDGMENT AS TO ALL PARTIES, AND (2) THE INTERLOCUTORY ORDER REMAINS SUBJECT TO REVISION.

LIST OF PARTIES

Pursuant to Rules 14(b) and 29.6 of the Supreme Court Rules, following is an alphabetical list of the petitioners in this action:

1. David M. Armstrong
2. L. Benson Barger
3. Wallace D. Black
4. Howard Brooks
5. Jerry A. Budd
6. Sonja M. Carter
7. Dominick C. Cizek
8. Carol D. Clark-Iley
9. Charles H. Davis
10. Kenneth O. Giessuebel
11. Herold P. Glaser
12. Robert A. Havlish
13. Kumar Hinduja
14. Joseph C. Jett
15. Glenn E. Johnson

16. Robert C. Lerche

17. Calvin M. Lightner

18. George W. McGuirk

19. James W. McLean

20. William G. Murphy

21. Donald L. Prasky

22. Clark C. Rains

23. Myrtle Y. Redding

24. Kenneth A. Richards

25. Russell G. Roberts

26. Linda L. Ryan

27. Victor W. Shaw

28. Linton W. Smith

29. Michael Sylvestri

30. Marlon K. Tarter

31. Delbert S. Turner

32. Edward W. Walsh

33. Joseph W. Williamson

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The Report and Recommendation of the United States Magistrate Judge, United States District Court, Middle District of Florida, Orlando Division, is not officially reported. The opinion is reprinted in the appendix, *infra*.

The handwritten affirmance of the United States District Court, Middle District of Florida, Orlando Division, of the Report and Recommendation of the Magistrate Judge is not officially reported. The handwritten note is reprinted in the appendix, *infra*.

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 93 F.3d 1505 (11th Cir. 1996). This opinion is reprinted in the appendix, *infra*.

The opinion of the United States Court of Appeals for the Eleventh Circuit, en banc, is reported at 138 F.3d 1354 (11th Cir. 1998). This opinion is reprinted in the appendix, *infra*.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit, en banc, rendered its opinion on April 16, 1998, reversing the panel decision of the United States Court of Appeals for the Eleventh Circuit.

This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

The district court had original jurisdiction pursuant to 29 U.S.C. § 633a.(c).

STATUTES AND RULES INVOLVED

Rule 54(b) of the Federal Rules of Civil Procedure:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the

entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

29 U.S.C. § 216(b), as incorporated by 29 U.S.C. § 626(b), in pertinent part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

STATEMENT OF THE CASE

Each of the petitioners in this case opted-in as a party plaintiff to an existing lawsuit brought against respondents under the Age Discrimination in Employment Act ("ADEA"), Carson Carmichael, et al. v. Martin Marietta Corp., et al., Case No. 93-0434-Civ-ORL018, in the United States District Court for the Middle District of Florida. (RE 1-1-4, RE 1-3-4) The Carmichael case had been brought by individual plaintiffs and on behalf of others similarly situated. Petitioners in the present case had filed with the court consents to become parties plaintiff, opting into the Carmichael case pursuant to 29 U.S.C. § 626(b), incorporating by reference 29 U.S.C. § 216(b) (Fair Labor Standards Act).

It is crucial to a proper understanding of the issue before this Court to emphasize that the opt-in procedure pursuant to 29 U.S.C. § 216(b) is fundamentally different than normal class action proceedings pursuant to Rule 23 of the Federal Rules of Civil Procedure. Specifically, under Rule 23, a potential plaintiff in a class action must affirmatively opt-out of an existing lawsuit in order not to be bound by its results, and an individual who does not opt-out is not a named plaintiff. See Fed. R. Civ. P. 23(c)(2). In contrast, under the ADEA opt-in procedure, "No employee shall be

a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (emphasis added).

In the Carmichael case, the plaintiffs alleged that defendants violated the ADEA by dismissing them from their long-term jobs.

On April 7, 1994, United States District Judge G. Kendall Sharp entered an order in the Carmichael case dismissing without prejudice the claims of the current petitioners on the theory that they did not fit the narrow criteria of similarly situatedness that the court prescribed in the same order. (RE 2-24-2 to 4; RE 2-11-14 to 22)

The April 7, 1994, order in the Carmichael case specified that the dismissals were without prejudice, but did not set forth any time limit within which to file a new lawsuit. (RE 2-11-22)

On October 11, 1994, in the United States District Court for the Middle District of Florida, Orlando Division, David M. Armstrong and other plaintiffs commenced this action against defendants. This case, no. 94-1066-Civ-ORL-18, again alleged that petitioners were dismissed from their positions of employment with defendants in violation of the ADEA.

Defendant Martin Marietta Technologies, Inc., on January 17, 1995, filed a motion for partial summary judgment, claiming that the petitioners in this case, who had been dismissed without prejudice from the Carmichael lawsuit, had failed to file the present lawsuit within 90 days after their dismissal from Carmichael. (RE 1-DC-Dkt Sh-11); see 29 U.S.C. § 626(e) (civil action in ADEA case must be brought within 90 days after date of receipt of notice from Equal Employment Opportunity Commission).

Magistrate Judge Donald P. Dietrich recommended on March 22, 1995, that the motion for partial summary judgment be granted on the theory that the petitioners had only 90 days within which to file their new lawsuits after being dismissed from the Carmichael case, and that their claims were therefore barred by the 90-day statute of limitations because they did not file their new lawsuits within that time frame.

District Court Judge G. Kendall Sharp adopted the magistrate judge's recommendation on April 5, 1995, in a handwritten entry on the margin of plaintiffs' objection to the magistrate judge's recommendation.

Because 13 plaintiffs remained in this case and were unaffected by Judge Sharp's partial summary judgment order, the dismissed plaintiffs moved that the

court enter judgment under Rule 54(b) of the Rules of Civil Procedure, so that the case could become immediately appealable. (RE 1-DC Dkt Sh-14) Judge Sharp entered an order on September 14, 1995, granting the Rule 54(b) motion, and a judgment on the same date dismissing the current petitioners from the action. (RE 2-29 and RE 2-30) Notice of appeal was filed September 25, 1995. (RE 1-DC Dkt Sh-14)

A panel of the Eleventh Circuit Court of Appeals, by a 2-1 vote, reversed the district court in an opinion filed September 11, 1996. 93 F.3d 1505 (11th Cir. 1996). The panel majority held that a claimant dismissed from a "class action" may: (1) within the time remaining before the statute of limitations runs, file an individual lawsuit; (2) await final judgment in the "class action," appeal from that final judgment, and if not successful, file an individual lawsuit within the time remaining under the statute of limitations at the time of dismissal; or (3) move for interlocutory appeal before the running of the statute of limitations. 93 F.3d at 1509. The court did not apply its new rules to petitioners because the law had been unsettled before the decision in the instant case was announced. The court held that the petitioners were permitted to continue their individual lawsuits in the present case, but were precluded from appealing the dismissal order or

the final judgment in the prior lawsuit. Id. at 1510.

The Eleventh Circuit Court of Appeals, sitting en banc, reversed the panel decision. The en banc court stated that the question presented was whether, in the absence of controlling authority, the statute of limitations begins to run again immediately upon the district court's entry of the interlocutory order denying class certification, or whether the statute remains tolled through final judgment in the former class action and completion of an appeal from the order denying class certification. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378 (11th Cir. 1998).

The en banc court held that the tolling of the statute of limitations ceases when the district court enters an interlocutory order denying class certification. Id. Therefore, given that the petitioners in this case filed their individual lawsuits more than 90 days after they were dismissed from the previous lawsuit, the en banc court affirmed the trial court's decision.

It is notable that the en banc court did not address petitioners' central argument, outlined in its brief and at oral argument, that Rule 54(b) of the Federal Rules of Civil Procedure clearly and unequivocally states that in a case involving multiple plaintiffs, the dismissal of fewer than all the

plaintiffs does not terminate the action "as to any of the claims or parties, . . . " See Fed. R. Civ. P. 54(b).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This Court should grant its writ of certiorari to review the decision of the en banc court because that court, in judicially overruling Rule 54(b), "so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's supervisory power." See Sup. Ct. R. 10(a).

Neither this court nor any other court has squarely focused on the narrow issue presented: Does the dismissal of one plaintiff in a multi-plaintiff lawsuit restart the statute of limitations for the dismissed plaintiff, even though Rule 54(b) of the Federal Rules of Civil Procedure specifically and expressly states that an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, and that any such interlocutory decision is subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all parties?

The various courts below which have considered this case have mischaracterized it as one involving class action

lawsuits. As set out in the Statement of the Case, this is not a class action case. Instead, this is a case involving multiple parties plaintiff, pursuant to the opt-in procedure of the ADEA. See 29 U.S.C. § 626(b), incorporating by reference 29 U.S.C. § 216(b). This unfortunate mischaracterization has resulted in the courts below focusing on this Court's class action jurisprudence. The en banc court, relying on dicta in cases from this Court, concluded that the statute of limitations, although tolled during a class action, ceases to be tolled once a district court enters an interlocutory order denying class certification. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378 (11th Cir. 1998).

Although petitioners do not believe these class action cases are dispositive of the narrow issue now before this Court, reliance on these cases, in any event, does not necessitate the unfortunate result of the en banc court. In no case cited by the en banc court, does this Court or any appellate court discuss and focus its attention on Rule 54(b), and what effect Rule 54(b) has on the outcome of the legal analysis.

Indeed, not even the en banc court discussed Rule 54(b), even though petitioners' brief and oral argument focused heavily on this rule. The obvious reason for the en banc court's refusal to address petitioners' argument is that, once Rule 54(b) is objectively

analyzed, there can be only one result: The dismissal of one plaintiff in a multi-plaintiff lawsuit does not restart the statute of limitations for the dismissed party until final judgment has been entered with regard to all claims and all parties, including a party plaintiff who has been dismissed by way of an interlocutory order.

Petitioners, therefore, seek the following simple, straightforward, bright line rule: A plaintiff in a multi-plaintiff lawsuit who is dismissed from that lawsuit pursuant to a Rule 54(b) interlocutory order remains a part of that lawsuit until there is a final adjudication of all claims and the rights and liabilities of all parties, including the dismissed party plaintiff. The statute of limitations, therefore, as to the dismissed plaintiff remains tolled until such final judgment is entered.

II. THE PROVISIONS OF RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE ARE VALID AND MANDATORY: ABSENT AN ENTRY OF FINALITY, NO INTERLOCUTORY ORDER BECOMES FINALLY EFFECTIVE UNTIL FINAL JUDGMENT.

Rule 54(b) of the Federal Rules of Civil Procedure states, in pertinent part:

> In the absence of such determination and direction, any order or other form of decision, however

> designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b) (emphasis added).

The Federal Rules of Civil Procedure are prescribed by the Supreme Court and approved by Congress. 28 U.S.C. §§ 2072(a), 2074(a). The Rules of Civil Procedure have the force of law. Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941); Brown v. E.W. Bliss Co., 818 F.2d 1405, 1409 (8th Cir. 1987). This Court has never invalidated any of the Rules of Civil Procedure. Hanna v. Plumer, 380 U.S. 460 (1965).

Furthermore, this Court has expressly held that Rule 54(b) is valid. Sears, Roebuck & Co. v. Mackay, 351 U.S. 427, 438 (1956).

No Rule 54(b) determination of finality was made with respect to the April 7, 1994, order of the district court. Thus, even though that order dismissed some of the plaintiffs from the case, it does not become a final order until the Carmichael case has ended, and the dismissed plaintiffs have

completed their appeal of the April 7, 1994 order.

As stated in the authoritative treatise on civil procedure, "If the court does not enter a Rule 54(b) order, the litigant knows that waiting until the disposition of the entire case before seeking an appeal will not lose him the right to have the order reviewed." 10 Wright Miller & Kane, Federal Practice and Procedure: Civil § 2654. If no Rule 54(b) certificate issues, the court's order remains interlocutory, and no time for appeal or anything else begins to run. Id. at § 2661; Perington Wholesale, Inc., v. Burger King Corp., 631 F.2d 1367, 1370, n.2 (10th Cir. 1979); Ansam Associates, Inc. v. Cola Petroleum, Ltd, 760 F.2d 442, 445 (2nd Cir. 1985); Spann v. Colonial Village, Inc., 899 F.2d 24, 31 (D.C. Cir. 1990).

The petitioners, therefore, have the absolute right under Rule 54(b) to await the final determination of the Carmichael case before filing new lawsuits. Until such time as all the claims and the rights and liabilities of all the parties, including these petitioners, have been decided, these petitioners, by the plain language of Rule 54(b), have not been terminated from the Carmichael lawsuit.

Furthermore, as stated in no uncertain terms in Rule 54(b), "the order or other form of decision is

subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b) (emphasis added). In other words, by the plain language of the rule, the district court can reverse itself at any time until final judgment.

Indeed, the en banc court concedes that there are cases in which the district court reconsiders and reverses a denial of "class certification." The en banc court noted that, although such reconsideration and reversal is rare, they do occur in approximately 3% of cases in which class certification is denied. See Armstrong, 138 F.3d at 1391 n.12.

The en banc court, in a startling piece of legal analysis, however, creates what appears to be a new judicial standard, the Rule of Three Percent. According to this new rule, the petitioners in this case were not reasonable by waiting more than 90 days to file their new lawsuits because, "motions for reconsideration of a denial of class certification are granted in less than 3% of cases in which certification is denied." See id. The en banc court gives no guidance as to how high the percentage would need to rise before it would be reasonable to depend on the express language of Rule 54(b).

The language of Rule 54(b) is simple and clear. The en banc court, by judicially overruling this rule, has created a dangerous situation not only in the Eleventh Circuit, but possibly throughout the nation. Based upon this holding, any plaintiff in a multi-plaintiff lawsuit who is dismissed prior to the conclusion of the entire lawsuit would be forced to file a protective individual lawsuit to ensure that her rights are protected. This Court, which has never addressed this narrow issue, should either grant its writ of certiorari, or in the alternative, simply reverse the en banc court *per curiam*, in order to correct this fundamental and unfortunate decision.

III. THIS COURT'S CLASS ACTION JURISPRUDENCE, EVEN THOUGH NOT APPLICABLE TO THIS CASE, IS NOT DISPOSITIVE OF THE ISSUE BEFORE THE COURT.

As stated throughout this petition, the courts below, including the en banc court, have consistently mischaracterized this case as one involving a class action. This is simply not the case. There are no unnamed plaintiffs in this case. Each and every petitioner, and each and every plaintiff in the Carmichael case, is a named plaintiff. Each was required to affirmatively opt-in to this case. See 29 U.S.C. § 626(b), incorporating by reference 29 U.S.C. § 216(b).

Even taking into account this Court's class action jurisprudence, however, the en banc court incorrectly concluded that the statute of limitations begins to run upon a denial of a class certification.

The commencement of a class action suspends the applicable statute of limitations for all asserted members of the putative class. Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983). The purpose of such tolling is to encourage class members reasonably to rely on the class action to protect their rights. Without tolling, class members would have to take action prior to the running of the statute of limitations in order to protect themselves in case class certification is later denied, even when they may reasonably expect to receive relief through the already filed class action. See id. at 350-51; Armstrong v. Martin Marietta Corp., 138 F.3d at 1380.

The en banc court, citing Crown Cork, American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) and United Airlines, Inc., v. McDonald, 432 U.S. 385 (1977), states that this Court has, in dicta, opined that the statute of limitations would begin upon denial of class certification. Armstrong, 138 F.3d at 1381-832. Although these cases could be read to support the en banc court's analysis, there are three crucial distinctions that the en banc court ignores: (1) each of these three

cases involve class certifications, not multi-plaintiff cases pursuant to an opt-in procedure, (2) this Court, in none of these cases, has ever focused on or even considered the effect of Rule 54(b) on its legal analysis, and (3) in each of these three cases, the narrow issue now before this Court was never addressed because the affected parties had filed lawsuits or intervened in an existing lawsuit within the appropriate statute of limitations or relevant time frame. Crown, Cork, 462 U.S. at 348; United Airlines, 432 U.S. at 392; American Pipe & Construction, 414 U.S. at 561. Perhaps it is because this exact issue has never come before this Court, the interplay between Rule 54(b) and the tolling of a statute of limitations has never been addressed.

Finally, it is important to note that, even the en banc court recognized that circuit courts of appeals are not unanimous with regard to this issue. See Armstrong, 138 F.3d at 1384 and n.18. The en banc court candidly concedes that the Seventh Circuit Court of Appeals, in Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), the Utah Supreme Court in American Tierra Corp. v. City of West Jordan, 840 P.2d 757 (Utah 1992), and various federal district courts, disagree with its analysis with regard to the tolling of the statute of limitations. Id.

Therefore, even though petitioners do not believe this case implicates class actions, there appears to be a split in the circuits, and this Court should issue its writ of certiorari to resolve this split.

CONCLUSION

For the reasons set out above, petitioners respectfully request this Court grant its writ of certiorari to correct the fundamental error made by the en banc court below.

Respectfully submitted this 18 day of September, 1998.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID M. ARMSTRONG, et al.,

Plaintiffs,

-vs- Case No. 94-1066-Civ-Orl-18

MARTIN MARIETTA CORPORATION, MARTIN MARIETTA TECHNOLOGIES, INC.,

Defendant.
---/

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause is before this Court pursuant to endorsed reference dated February 8, 1995. In accordance therewith, this Court was directed to make report and recommendation on the Defendant's[1] Motion for Pretrial Summary Judgment, filed January 17, 1995 [Document #11]. This Motion is at issue on the response of the Plaintiffs, filed

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[1] There are two named defendants in this case. This Court assumes, as did the Plaintiffs in their response, that this Motion is being filed on the behalf of both.

February 1, 1995 [Document #15].[2] For the reasons set forth hereafter, it is respectfully recommended that the Motion be GRANTED and that summary judgment be entered against Plaintiffs David M. Armstrong, L. Benson Barger, Wallace D. Black, Howard Brooks, Jerry A. Budd, Sonja M. Carter, Dominick C. Cizek, Carol D. Clark-Iley, Charles H. Davis, Kenneth O . Giessuebel, Herold P. Glaser, Robert A. Havlish, Kumar Hinduja, Joseph C. Jett, Glenn E. Johnson, Robert C. Lerche, Calvin N. Lightner, George W. McGuirk, James W. McLean, William G. Murphy, Donald L. Prasky, Clark C. Rains, Myrtle U. Redding, Kenneth A. Richards, Russell G. Roberts, Linda L. Ryan, Victor W. Shaw, Linton W. Smith, Michael Sylvestri, Marlon K. Tarter, Delbert S. Turner, Edward W. Walsh, and Joseph W. Williamson, and in favor of the Defendants.

PRIOR PROCEEDINGS AND FACTS

The Plaintiffs allege that the Defendants, Martin Marietta Corporation and Martin Marietta Technologies, Inc., (Martin), discriminated against them on the basis of age in violation of the Age

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[2] The Defendant's Supplemental Memorandum of Law, filed February 3, 1995, [Document #18], is stricken as an impermissible reply. Local Rule 3.01(b).

Discrimination in Employment Act, 29 U.S.C. § 621 et seq., (ADEA). These 46 Plaintiffs have joined in filing individual actions against Martin. The Defendants seek the entry of summary judgment against the Plaintiffs Carol Clark-Iley, Glen Johnson, and Victor Shaw, (the Shaw Plaintiffs), on the basis that none of these Plaintiffs has ever filed their claims with the EEOC. As to Plaintiffs David M. Armstrong, L. Benson Barger, Wallace D. Black, Howard Brooks, Jerry A. Budd, Sonja M. Carter, Dominick C. Cizek, Charles H. Davis, Kenneth O. Giesseubel, Herold P. Glaser, Robert A. Havlish, Kumar Hinduja, Joseph C. Jett, Robert C. Lerche, Calvin N. Lightner, George W. McGuirk, James W. McLean, William G. Murphy, Donald L. Prasky, Clark C. Rains, Myrtle Y. Redding, Kenneth A. Richards, Russell G. Roberts, Linda L. Ryan, Linton W. Smith, Michael Sylvestri, Delbert S. Turner, Edward W. Walsh, and Joseph W. Williamson (the Armstrong Plaintiffs), as well as the Shaw Plaintiffs, summary judgment is sought on the grounds that these plaintiffs failed to file this action within ninety (90) days of their dismissal from the Carmichael case.[3]

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[3] As to Plaintiff James W. McLean, judgment is sought on the basis that he failed to bring suit within ninety (90) days of the receipt of his right to sue letter.

In May 18, 1993, a former employee of the Defendant, Raymond T. McGoldrick, (McGoldrick), filed a charge of age discrimination on behalf of himself and other similarly situated. All of the Armstrong Plaintiffs have filed charges with the EEOC. None of the Shaw Plaintiffs has filed EEOC charges. All of the Plaintiffs in this case were dismissed as class members in Carmichael, et al., v. Martin Marietta Corp. and Martin Marietta Technologies, Inc., Case No. 93-434-CIV-ORL-19. This dismissal, which was without prejudice, occurred on April 7, 1994. The instant action commenced on October 11, 1994, [Document #1], some 180 days after the dismissal. No appeal was taken on that Order.

ISSUES AND ANALYSIS

As to all Plaintiffs summary judgment is sought on the grounds that they have failed to file this action within ninety (90) days of their dismissal from the Carmichael case.[4] A civil action under the ADEA must be brought within 90 days of receipt of the EEOC determination of the individual's

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[4] As to Plaintiff James W. McLean, judgment is sought on the basis that he failed to bring suit within ninety (90) days of the receipt of the EEOC determination on his claim.

claim. 29 U.S.C. §626(e).[5] The Defendants contend that such period commenced upon the entry of the Order of dismissal in Carmichael. The Plaintiffs disagree, asserting that they were, and remain, under no obligation to file this case within ninety (90) days of their dismissal from Carmichael because the Order dismissing them was not a final appealable order. The Plaintiffs maintain that they need not file this action until ninety (90) days after the conclusion of the appellate process in Carmichael, which as a practical matter may not be for a number of years.

It is settled that the running of the ninety (90) day period within which a Plaintiff must commence suit is tolled during the period that there is a pending class action in which the Plaintiff is a putative class member. Crown, Cork & Seal Company, Inc. v. Parker, 462 U.S. 345 (1983). The rationale for this rule is simple; as long as a class action is pending the employer is on notice as to the claims of all putative class members. Andrews v. Orr, 851 F.2d 146, 150 (6th Cir. 1988). Further, it is reasonable for putative class members to rely on a pending class action to protect their

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[5] The Defendant does not contest, and thus the Court assumes, that the Plaintiffs herein filed suit in a timely fashion in the Carmichael case.

rights. Griffin v. Singletary, 17 F.3d 356, 360 (11th Cir. 1994).[6]

The single, unfailing requirement set forth in every case which discusses the matter of tolling during the pendency of a class action is that the individual be a putative member of the class. E.g.: Griffin v. Singletary, 17 F.3d 356 (11th Cir. 1994). Putative is defined as reputed; supposed; commonly esteemed. Blacks Law Dictionary 1401 (4th ed. 1968). The Plaintiffs against whom summary judgment is sought herein were dismissed from the Carmichael class because they did not satisfy the requirements of that class. Thus, these Plaintiffs can no longer be considered to be putative members of such class.

That being the case, is there any sound reason why the statutory period should remain tolled after these Plaintiffs have been dismissed from the class? The answer is no. It is only reasonable that the Defendants will expect the dismissed Plaintiffs to assert their individual claims once they have been removed from the class, and to

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[6] Additionally, to hold otherwise would require putative class members to protect their individual rights by filing individual suits resulting in the burden and inefficiency of potentially needless multiple actions. See: American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974).

assume once the statutory filing period has lapsed that no claims will be brought. Further, it is also reasonable to expect that Plaintiffs removed from a class action will promptly act on their individual claims, there being no good reason for them to assume that their interests are being protected by that class action.

The Plaintiffs' argument that because the dismissal in the Carmichael case was no a final order and appellate rights remain that the statutory period remains tolled reflects a misunderstanding of the judicial purpose for tolling. As discussed above, tolling protects the reasonable expectations of putative class Plaintiffs, places a demand of reasonable expectation on the Defendant, and protects the courts from multiple individual suits where a class action exists that can afford the Plaintiffs relief.[7] None of these policy reasons apply herein. Therefore, summary judgment should be granted.

7

This Court recognizes that the Plaintiffs contend that the Carmichael class may afford them relief, assuming Judge Sharp's order of dismissal is appealed, and the appellate court's find the order to be in error. However, at present, and as of the date of dismissal there exists no class which can afford these Plaintiffs any relief.

The Defendant also seeks the entry of summary judgment against the Plaintiffs Carol Clark-Iley, Glen Johnson, and Victor Shaw, (the Shaw Plaintiffs), on the basis that none of these Plaintiffs has ever filed their claims with the EEOC. Though summary judgment should be entered against these Plaintiffs for the reasons set forth above, this asserted ground is without merit.

As set forth above, a timely EEOC by filing was made by McGoldrick alleging class discrimination during the same time frame. This satisfies the EEOC filing requirement even though the Plaintiffs here in are Plaintiffs in a different action than McGoldrick. Calloway v. Partners Nat. Health Plans, 986 F.2d 446, 449-50 (11th Cir. 1993).

CONCLUSION AND RECOMMENDATION

The period during which the Plaintiffs statutory ninety (90) day filing period was tolled expired when they were no longer putative class members, that being the date on which they were dismissed from the Carmichael case. As such, as to the 32 identified Plaintiffs, their claims having been filed more than 180 days after their dismissal are untimely, and summary judgment should be entered against them. Such relief is respectfully recommended.

Failure to file written objections to the proposed findings and recommendations contained in this report

within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully submitted this the 22nd day of March, 1995.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

United States District Court Judge Kendall Sharp hand wrote his decision across the cover page of Plaintiffs' Objection to Recommendation of Magistrate Judge. Judge Sharp's decision read as follows:

> Class plaintiffs were no longer putative members of the class, 90 day statute is applicable. Magistrate order is affirmed and so ordered. 5 April 95.

Signature of Judge Sharp.

A copy of Judge Sharp's handwritten note is attached.[1]

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1 Please excuse the fact that the text over which Judge Sharp wrote his opinion does not comply with Supreme Court Rule 33. This page is included so that the Court can see Judge Sharp's actual notation.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID ARMSTRONG, et al.,
Plaintiffs,

v.

MARTIN MARIETTA CORPORATION, et al.,
Defendants.

Case No. 94-1066-CIV-ORL-18

FILED
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PLAINTIFFS' OBJECTION TO RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1), plaintiffs file this written objection to the report and recommendation of the United States Magistrate Judge dated March 22, 1995, to the extent it is recommended that the claims of 33 of the plaintiffs be dismissed by reason of this action not having been filed within 90 days after the date on which these plaintiffs were dismissed in Carmichael v. Martin Marietta Corporation, 93-434-CIV-ORL-19.

SUMMARY AND INTRODUCTION

The magistrate judge does not cite any case law that would require the result he recommends. He mentions two relevant cases, Crown, Cork and Seal Company, Inc. v. Parker, 462 U.S. 345 (1983), and Griffin v. Singletary, 17 F.3d 356 (11th Cir. 1994), but the first of these cases does not require the result reached by the magistrate judge, and his recommendation is flatly inconsistent with the second case. The magistrate judge ignores altogether the controlling provisions of Rule 54(b) of the Rules of Civil Procedure, establishing that the April 7, 1994, order in the

BEST AVAILABLE COPY

David M. ARMSTRONG, L. Benson Barger, Wallace D. Black, Howard Brooks, Jerry A. Budd, Sonja M. Carter, Dominick C. Cizek, Carol D. Clark-Iley, Charles H. Davis, Kenneth O . Giessuebel, Herold P. Glaser, Robert A. Havlish, Kumar Hinduja, Joseph C. Jett, Glenn E. Johnson, Robert C. Lerche, Calvin N. Lightner, George W. McGuirk, James W. McLean, William G. Murphy, Donald L. Prasky, Clark C. Rains, Myrtle U. Redding, Kenneth A. Richards, Russell G. Roberts, Linda L. Ryan, Victor W. Shaw, Linton W. Smith, Michael Sylvestri, Marlon K. Tarter, Delbert S. Turner, Edward W. Walsh, and Joseph W. Williamson, Plaintiffs-Appellants,

Constantino A. Barbitta, James R. Baxter, Robert D. Biggs, James H. Black, Rick L. Bordner, Rodmond M. Cookson, David B. Pool, Roger A. Purcell, Rama S. Singh, Charles M. Smith, Robert G. Swanson, William F. Waldrop, Kenneth E. Welch, Plaintiffs,

v.

MARTIN MARIETTA CORP, Martin Marietta Technologies, Inc., Defendants-Appellees.

No. 95-3255

United States Court of Appeals
Eleventh Circuit

September 11, 1996.

Before HATCHETT and ANDERSON, Circuit Judges, and WOOD, Senior Circuit Judge.

HATCHETT, Circuit Judge.

As a matter of first impression in this circuit, the court outlines options that plaintiffs, who have been dismissed from class actions after opting-in to the class actions, may take to protect their right to litigate their claims individually before a statute of limitations runs. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In 1993, David M. Armstrong and thirty-two other former employees of Martin Marietta Corporation and Martin Marietta Technologies, Inc., (collectively "Martin Marietta") opted in an Age Discrimination in Employment Act (ADEA) class action captioned *Carmichael et al. v. Marietta Technologies, Inc.*, case no. 94-100-Civ-Orl-18. On April 7, 1994, the district court dismissed Armstrong and the other thirty-two employees' claims without prejudice concluding that they were not similarly situated to the Carmichael plaintiffs. On October 11, 1994, more than ninety days after the district court's order of dismissal, Armstrong, the thirty-two employees, and twelve additional former employees of Martin Marietta (hereinafter the "Armstrong plaintiffs) filed this ADEA action in the Middle District of Florida alleging

that Martin Marietta engaged in age discrimination when it laid them off in 1988 as part of its large scale work force reduction. On October 25, 1994, the Armstrong plaintiffs filed an amended complaint adding an additional plaintiff making the number of plaintiffs in this action forty-six.

On January 17, 1995, Martin Marietta filed a motion for partial summary judgment against twenty-nine of the forty-six Armstrong plaintiffs on the grounds that these plaintiffs failed to file their individual lawsuits within ninety days after receiving notice of their dismissal from the Carmichael class action. Martin Marietta also sought summary judgment against three other Armstrong plaintiffs, Carol Clark-Iley, Glenn Johnson and Victor Shaw, on the additional ground that they each failed to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged unlawful practice, in violation of 29 U.S.C. 626(d)(2) (1994).

On March 22, 1995, a magistrate judge issued a report recommending that the district court grant Martin Marietta's partial summary judgment motion. The magistrate judge concluded that the ninety-day filing period commenced to run on the Armstrong plaintiffs' claims when the district court dismissed them from the Carmichael class action; therefore, their claims

were time barred. The magistrate judge also recommended that the district court grant summary judgment against Marlon K. Tarter who was not included in Martin Marietta's summary judgment motion. Finally, the magistrate judge concluded that the "single-file" rule did not require plaintiffs Johnson, Clark-Iley and Shaw to file charges of discrimination with EEOC rejecting Martin Marietta's alternative ground for partial summary judgment. On May 10, 1995, the district court adopted the magistrate judge's report and recommendation and granted partial summary judgment in favor of Martin Marietta. On September 14, 1995, the district court amended its order and entered final judgment pursuant to Rule 54(b). This appeal followed.

CONTENTIONS

The Armstrong plaintiffs contend that the ninety-day filing period for bringing an ADEA action in district court remained tolled after their dismissal from the class action because the district court did not enter a final judgment. In the alternative, the Armstrong plaintiffs contend that this court should excuse their failure to file their individual lawsuits within the filing period because they did not receive notice that the ninety-day filing period resumed upon their dismissal from the class action. In response, Martin Marietta contends that the "interlocutory" status of the order

dismissing the Armstrong plaintiffs from the Carmichael action does not affect the Armstrong plaintiffs' obligation to file their individual lawsuits within ninety-days of their dismissal from the class action. Martin Marietta also contends that this court should not excuse the Armstrong plaintiffs' failure to file their individual ADEA lawsuit within the statute of limitations period.

ISSUES

The sole issue we address is whether the tolling of the ninety-day statute of limitations of the ADEA, due to the claimants' membership in the class action, remains tolled when the district court dismisses claimants from the pending class action in an interlocutory order.

DISCUSSION

[1,2] We review the district court's grant of summary judgment *de novo*. *Johnson v. Arros Co.*, 75 F.3d 1528, 1531 (11th Cir. 1996). Title 29 U.S.C. § 626(e) requires an ADEA claimant to file a lawsuit within ninety days of receiving notice of the right to sue from the EEOC. Membership in a pending class action, however, tolls the ninety-day period for filing an individual lawsuit. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-53, 103 S.Ct. 2392, 2396-97, 76 L.Ed.2d 628 (1983). Title 29 U.S.C. §

216(b) authorizes an ADEA claimant to commence a class action or opt into an existing class action. *See* 26 U.S.C. § 626(b) (1994) (borrowing the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b)); *See also Grayson v. K Mart Corporation*, 79 F.3d 1086, 1097 (11th Cir. 1996) (an ADEA claimant must demonstrate that a reasonable basis exists for his or her claim of class-wide age discrimination and make detailed allegations, supporting those allegations with affidavits). As the Supreme Court explained in *Crown, Cork & Seal Co.*:

> '[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.' Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied.

Crown, Cork & Seal Co., 462 U.S. at 353-54, 103 S.Ct. at 2397-98 (quoting *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 766-67, 38 L.Ed.2d 713 (1974)) (citations omitted). The tolling of the ninety-day statute of limitations protects the claimant in the event class certification is ultimately denied or vacated. Courts provide this protection because it is reasonable for such

claimants to rely on the named plaintiffs in the pending class action to protect their rights. *Crown, Cork & Seal Co.*, 462 U.S. at 352-53, 103 S.Ct. at 2396-97 ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."); *Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) ("Insofar as the individual claims are concerned, punitive class members should be entitled to rely in a class action as long as it is pending."). Neither this court nor other circuits, however, have addressed whether the ninety-day statute of limitations period remains tolled when the district court dismisses claimants from a pending class action in an interlocutory order. This question is of particular importance because at the time of dismissal claimants cannot appeal the district court's dismissal order as of right because it is not a final judgment. *See* Fed.R.Civ.P. 54(b).

In this case, the district court held that section 626(e) bars the Armstrong plaintiffs' individual ADEA lawsuit because they failed to commence their action within ninety days of receiving notice of their dismissal from the Carmichael class action. The district court found that in order for the Armstrong plaintiffs to timely file their individual lawsuits under section 626(e), they were required to file a lawsuit on or before July 7, 1994; the Armstrong plaintiffs, however, filed their lawsuit on October 11, 1994. The

Armstrong plaintiffs argue that the district court erred in holding that section 626(e) barred their ADEA claims. They contend that the ninety-day filing period remained tolled even after their dismissal from the class action because the district court's order constituted an unappealable order under rule 54(b) of the Rules of Civil Procedure. Specifically, the Armstrong plaintiffs argue that the dismissal order did not have the effect of commencing the ninety-day statute of limitations because the district court in Carmichael dismissed their claims without prejudice; therefore, the district court could have vacated its order any time before final judgment. *See* Fed.R.Civ.P. 54(b). Based on this reasoning, the Armstrong plaintiffs contend that tolling of the ninety-day filing period does not end until the district court enters a final judgment in the Carmichael action.

Martin Marietta concedes that the Armstrong plaintiffs' status as opt-in plaintiffs in the class action tolled the ninety-day filing period under Section 626(e), but argues that the tolling of the ninety-day filing period ceased and the ninety-day filing period resumed when the district court dismissed the appellants from the Carmichael action. Martin Marietta also contends that this is a just result because the Armstrong plaintiffs could not reasonably rely on the class to

represent their interests after receiving notice of their dismissal.

[3,4] As previously discussed, courts will not toll the running of the statute of limitations if claimants unreasonably relied on the pending class action to protect their rights. *Crown, Cork & Seal Co.*, 462 U.S. at 352-53, 103 S.Ct. 2396-97. Thus, the centra question in this case is whether it is reasonable for claimants to rely on a pending class action to protect their rights after their dismissal from the class action when the district court's dismissal order is subject to revision at any time before the entry of final judgment and is unappealable until entry of final judgment. Federal Rule of Civil Procedure 54(b) provides:

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action as to any of the claims or parties*, and the order or other form of decision *is subject to revision at any time before the entry of judgment* adjudicating all claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b) (emphasis added). Although rule 54(b) permits the court, upon a party's motion for entry of final judgment, to direct final judgment as to

one or more but fewer than all the parties in a class action where "no just reason for delay exists," the court is not required to enter final judgment in an action involving multiple parties. Fed.R.Civ.P. 54(b)

[5] In the context of class actions, the "interlocutory" status of the dismissal order does not negate the fact that the claimants lose their membership in the class action. This loss of membership, however, may only be temporary because the district court may reconsider its dismissal order and vacate the order, or upon final judgment the claimants may appeal their dismissal and the appellate court may reverse the district court's decision. For these reasons, we hold that claimants dismissed from a class action may: (1) within the remaining time before the statute of limitations runs, file an individual lawsuit thereby rendering any appeal of their dismissal from the class action moot; or (2) await final judgment in the class action, appeal from that final judgment, and if not successful file an individual lawsuit within the time that remained at the time of their dismissal; or (3) before the running of the statute of limitations, move for an interlocutory appeal. If the district court certifies the issue for interlocutory appeal, interlocutory appeal is taken, and the district court is affirmed, tolling of the running of the statute of limitations ceases and the claimant may file an individual

lawsuit before the statute of limitations runs. If the district court declines to certify the issue for appeal or an interlocutory appeal is not taken, the claimant may file an individual lawsuit within the time remaining or exercise option 2 and await final judgment.

Our holding today promotes section 216(b) because it eliminates the need for claimants who intend to appeal their dismissal from the class action to file individual lawsuits while awaiting final judgment and avoids "needless multiplicity of actions - precisely the situation that [class actions] and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal Co.*, 462 U.S. at 351, 103 S.Ct. at 2396. In addition, this requirement discourages claimants who have opted into a pending class and are ultimately dismissed from taking no action during the pendency of the class action when they have no intention of appealing their dismissal from the class.

Moreover, the interests of justice necessitate our extending the application of the class action tolling rule for several reasons. First, "[c]lass members who do not file [an individual lawsuit] while the class action is pending cannot be excused of sleeping on their rights." *Crown, Cork & Seal Co.*, 462 U.S. at 352, 103 S.Ct. at 2397. Second, ending the tolling of the statute of limitations under these

circumstances, in effect, forces the claimants upon dismissal from a class action in an interlocutory order to choose between filing an individual lawsuit within the statute of limitations period or exercising their right to appeal their dismissal. Third, and most importantly, the tolling of the ninety-day statute "creates no potential for unfair surprise" because the class complaint notifies the defendants of the substantive claims, the number and "'generic identities of the potential plaintiffs who may participate in the judgment.'" *Crown, Cork & Seal Co.*, 462 U.S. at 353, 103 S.Ct. at 2398 (quoting *American Pipe*, 414 U.S. at 555, 94 S.Ct. at 767-68).

[6] If we applied this new rule of law to this case, section 626(e) would bar the Armstrong plaintiffs' individual actions because the Armstrong plaintiffs filed their individual ADEA lawsuit after the ninety-day statute of limitations had expired but before final judgment. We find this result unjust because the law prior to our holding today was silent on this issue. We therefore conclude that the Armstrong plaintiffs may continue in their individual lawsuits in this case, but may not appeal the dismissal order or the final judgment in the Carmichael class action. Accordingly, we reverse the district court's conclusion of law that section 626(e) bars the individual ADEA lawsuit as to these plaintiffs.

We find that our holding today renders the Armstrong plaintiffs' remaining arguments moot; therefore, we summarily reject them without discussion.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment against the Armstrong plaintiffs and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED

ANDERSON, Circuit Judge, dissenting:

Because I believe the rule created by the majority is inconsistent with Supreme Court precedent and unjustified by considerations of policy, I respectfully dissent. I would have affirmed the district court by holding that the tolling period ceased, and thus the statute of limitations began to run again, as soon as the district court excluded appellants as members of the *Carmichael* class action.

The majority's holding - that the statute of limitations remains tolled through completion of the appeals process in the names plaintiffs' case - conflicts with Supreme Court precedent. In *American Pile & Constr. Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d

713 (1974), the State of Utah filed a class action antitrust complaint with just eleven days left to run in the limitations period. Several months later, the district court entered an order denying class certification, because of the failure to satisfy the numerosity requirement of Fed.R.Civ.P. 23(a)(1). Eight days after this order, several state and local agencies who had been putative class members moved to intervene in the action to become plaintiffs. The Court held that the filing of the original class action complaint "suspended the running of the limitations period *only during the pendency of the motion to strip the suit of its class action character.*" Id. at 561, 94 S.Ct. at 770 (emphasis added). The Court explained that "the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene." *Id.* Although apparently there was no argument that tolling should continue thereafter because the order denying class status was interlocutory, and thus it might be said that the Court did not squarely reject such an argument, surely the Court assumed that the crucial time for tolling to end was the district court's order denying class certification, not some later final order.

In *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), the Court applied

the *American Pipe* tolling rule not only for persons who sought to intervene in the named plaintiffs' case after class certification was denied, but also for persons who wished to file separate suits. Within ninety days after the district court denied class certification in the Title VII action, but almost two years after receiving a right to sue notice from the EEOC, respondent Parker filed an individual Title VII complaint. By explaining that Parker "retained a full 90 days in which to bring suit *after class certification was denied*," *id.* at 354, 103 S.Ct. at 2398 (emphasis added), the Court indicated that the tolling of the statute of limitations ceased as soon as the district court denied class certification, and not when a final decision on the merits was reached.[1]

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[1] The first sentence of the opinion reveals the Court's belief that the statute of limitations recommences when the district court denies class certification, not at some later time:

> The question presented in this case is whether the filing of a class action tolls the applicable statute of limitations and thus permits all members of the putative class to file individual actions in the event that class certification is denied, provided, of course, that those actions are instituted within the time that remains

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), the district court denied class certification in a Title VII case, and the named plaintiffs successfully litigated their case to a settlement. Eighteen days after the district court entered a judgment of dismissal upon the settlement, a putative class member filed a motion to intervene for the sole purpose of appealing the district court's earlier denial of class certification. The Court held that the motion was timely under Fed.R.Civ.P. 24 because it was filed "within the [30 day] time period in which the named plaintiffs could have taken an appeal." In its analysis, the Court addressed the defendant's argument that the intervenor had no interest in the litigation because the statute of limitations had expired. The Court emphasized that the purpose of the motion was to appeal the denial of class certification, and not to litigate an individual claim:

> This [statute of limitations] argument might be persuasive if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim . . ., for she then would have occupied the same

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on the limitations period.

Id. at 346-47, 103 S.Ct. at 2394.

> position as the intervenors in *American Pipe*. But the later motion to intervene in this case was for a wholly different purpose. That purpose was to obtain appellate review of the District Court's order denying class action status . . ., and the motion complied with, as it was required to, the time limitation for lodging an appeal. . . . Success in that review would result in the certification of a class, the named members of which had complied with the statute of limitations; the respondent is a member of that class against whom the statute had not run at the time the class action was commenced.

Id. at 392, 97 S.Ct at 2468-69 (footnote omitted). The passage quoted above strongly implies that the statute of limitations for suing in one's own name begins to run again as soon as the district court denies class certification, although an excluded putative class member whose individual claim is barred by the statute of limitations may still appeal the denial of class certification.

In addition to the Supreme Court precedent discussed above, at least two federal appellate courts have rejected the argument that the statute of limitations for filing an individual claim should remain tolled through an unsuccessful appeal of the denial of

class certification. *See Nelson v. County of Allegheny*, 860 F.Supp. 1080, 1084 (W.D.Pa. 1994) ("[T]he claims of the plaintiff in *United Airlines* only survive as part of the class action and only if the decertification order is reversed on appeal."). *aff'd*, 60 F.3d 1010 (3d Cir.1995) (holding that the tolling of the statute of limitations ceased upon the district court's order denying class certification, and did not continue through completion of the appeals process), *cert. denied*, ___ U.S. ____, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996); *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir.) (per curiam) (holding that the statute of limitations begins to run again upon the district court's original denial of class certification, even if the district court later reconsiders the issue and certifies a class), *cert. denied*, 493 U.S. 821, 110 S.Ct. 79, 107 L.Ed.2d 45 (1989).

Considering the case law discussed above, I would hold that the statute of limitations began to run again as soon as the district court excluded appellants as members of the *Carmichael* class action. Moreover, several considerations of policy persuade me that the result reached by the majority is unwise, and that the court should have adopted the simpler approach I advocate.

Tolling the statute of limitations while a class action is pending

encourages reasonable reliance on the named plaintiffs to protect the interests of the putative class members. *See Crown, Cork & Seal*, 462 U.S. at 362-63, 103 S.Ct. at 2397 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."). In my view, after the district court enters the order denying class action status, reliance on the named plaintiffs is no longer reasonable, and the excluded putative class members should be on notice that they must act to protect their rights. *See United Airlines, Inc., v. McDonald*, 432 U.S. 385, 399, 97 S.Ct. 2464, 2472, 53 L.Ed.2d 423 (1977) (Powell, Jr., dissenting). According to the majority, however, continuing to toll the statute of limitations after denial of class certification is justified: the denial of class action status "may be only temporary because the district court may reconsider its dismissal order and vacate the order, or upon final judgment of the claimants may appeal their dismissal and the appellate court may reverse the district court's decision." Maj. Op. at 3460. To the contrary, I find it difficult to believe that a reasonable person would rely on the hope that some day a court might determine that the suit should have proceeded as a class action. When the district court

denies class certification,[2] the named plaintiffs no longer have a duty to advance the interests of the excluded putative class members. *See* Fed.R.Civ.P. 239(c)(1), advisory committee's note (explaining that the trial court's order denying class action status "strip[s] [the suit] of its character as a class action," thus requiring the litigation to proceed as a non-class action, even though the district court may change its mind and certify a class at any time before a decision on the merits); *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir.1975) (rejecting the argument that the interlocutory nature of the district court's order denying class certification requires the named plaintiffs to exercise a continuing fiduciary duty to the putative class members). Although it is possible that the district court may reconsider its order denying class certification, or that an appellate court may ultimately reverse it, district courts have broad discretion with respect to such rulings.

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[2] Technically speaking, the district court in the instant case did not deny class certification altogether; rather, it certified a narrow class that did not include appellants as members. As a shorthand, I will refer in this opinion to the more common situation where the district court denies class certification altogether.

See, eg., Jones v. Firestone Tire & Rubber Co., Inc., 977 F.2d 527, 531 (11th Cir.1992)(citing cases for the proposition that "[a] district court's denial of a class certification will not be disturbed absent an abuse of discretion"), *cert. denied*, 508 U.S. 961, 113 S.Ct. 2932, 124 L.Ed.2d 682 (1993). Thus, reliance on the possibility of a change in the order denying class certification is ordinarily not reasonable.[3] For the foregoing reasons, I believe that tolling the statute of limitations after the district court denies class certification is unnecessary to protect any *reasonable* reliance by putative class members on their former class representatives.

While tolerating unreasonable reliance by putative class members on

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[3] Furthermore, it could take years for the named plaintiffs' case to reach final judgment on completion of the appeals process, and there are no guarantees that the named plaintiffs will prevail on the merits (or obtain a favorable settlement). Thus, even if the tolling of the statute of limitations is extended as contemplated by the majority, many putative class members will protect themselves by filing an individual suit soon after the district court denies class certification.

their former class representatives, the majority's extended tolling rule creates a substantial risk of unfair prejudice to defendants. Statutes of limitations are intended to protect defendants by preventing "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). The majority's rule will unfairly prejudice at least some defendants by extending the tolling of the limitations period through the completion of an appeal of the class certification decision. The statute of limitations conceivably could remain tolled for several years, especially under the majority's option 2 where no interlocutory appeal occurs. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 (3d Cir.1995) (holding that such an extended tolling period would be "unreasonable"), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996). The potential length of the delay certainly increases the probability of lost evidence, faded memories, missing witnesses, and other forms of prejudice to the defendant. Of course, the *American Pipe* tolling rule also causes some delay, even if the tolling ceases as soon as the district court denies class certification. However, the length of the delay (and hence the risk of prejudice) is much smaller, in part because Fed.R.Civ.P.

23(c)(1) directs the district court to make the class certification decision "[a]s soon as practicable after the commencement of an action brought as a class action." *See American Pipe*, 414 U.S. at 562, 94 S.Ct. at 770 (Blackmun, J., concurring) (noting that district courts can make the *American Pipe* rule more fair to defendants, *inter alia*, by making the class certification decision promptly).

Because I believe it is unreasonable for plaintiffs to rely on an action after being dismissed from it, and because I believe the majority's rule unfairly prejudices defendants, I would end the tolling of the statute of limitations as soon as the trial court denies class certification. Thus, when the district court denies class certification, I would require the dismissed class member to file an individual suit (or intervene to become a party in the named plaintiffs' case) within the time remaining in the statute of limitations period. If the claimant also wished to appeal his or her exclusion from the class, he or she could file a motion pursuant to Fed.R.Civ.P. 54(b) (or 28 U.S.C. § 1292(b)) seeking the class action judge's permission to file an interlocutory appeal. The claimant could then request a stay of his or her individual lawsuit pending the outcome of the class certification appeal. Although a decision whether to grant a stay is a matter of discretion with the

district court, the claimant would have a strong argument for a stay if the class action judge allowed an interlocutory appeal of the class certification issue and the claimant could demonstrate that there was merit to the interlocutory appeal. My approach thus depends on the sound discretion of district judges: the discretion of the class action judge to allow an interlocutory appeal in cases where there is some hope for a successful appeal, and the discretion of the individual suit judge to stay proceedings pending the outcome of an appeal if such a stay would serve the interests of justice.

The foregoing discussion demonstrates that the approach I advocate is supported by strong Supreme Court dicta, by the square holdings of two circuit courts of appeal, and by relevant policy considerations. I also respectfully submit that the rule set forth by the majority contains unnecessary ambiguities and complexities.

As I understand it, the majority offers putative class members the following three options after the district court enters the order denying them participation in the class action:

(1) They may file an individual lawsuit within the remaining time before the statute of limitations expires. The majority apparently contemplates that

the tolled statute of limitations would recommence its running at the time of the district court's order denying class certification.[4] The majority opinion also indicates that filing the individual suit operates as a waiver of the right to participate in any appeal regarding the denial of class certification;[5] or

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[4] The majority makes this point clear in its treatment of the facts of the case. *See* Maj. Op. at 3461 ("If we applied this new rule of law to this case, [the statute of limitations] would bar the Armstrong plaintiffs' individual actions because the Armstrong plaintiffs filed their individual ADEA lawsuit after the ninety-day statute of limitations had expired but before final judgment."). Also, in its description of option 1, the majority states that the individual suit should be filed "within the remaining time before the statute of limitations runs."

[5] I infer this "waiver" concept from the majority's description of option 1, which states that the filing of an individual suit renders "moot" any appeal regarding the denial of class certification. I think the majority is creating a wavier, because it is not clear how the concept of mootness would operate in this context. Both ordinary principles of mootness and the dicta in *United Airlines*, 432 U.S. at 392, 97

(2) They may await final judgment in the named plaintiffs' case, intervene therein and appeal from the earlier order denying class certification.[6] If that appeal is unsuccessful, they may then file an individual suit within the time that remained as of the district court's order denying class certification.[7] In other words, after

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S.Ct. at 2468-69, suggest that there is no mootness. (The doctrine of res judicata, or the related doctrine of collateral estoppel, might apply when the individual suit is simply filed.)

[6] It is not clear what happens if the putative class members choose not to appeal their exclusion from the class (e.g., if the defendant prevails on the merits). I presume that the statute of limitations begins to run again upon the expiration of the time for filing an appeal from the final judgment in the named plaintiffs' case.

[7] The majority's opinion does not explain the exact point at which the statute of limitations begins to run again. For example, does it recommence on the date of the appellate court's opinion, or when the time for seeking certiorari expires? The appropriate time would probably be when no further appeals (or rehearings) are possible, which of course entails the maximum delay before the statute of limitations

the district court denies class certification, the statute of limitations for filing an individual suit remains tolled until the named plaintiffs' case reaches final judgment and no further appeals with respect to the denial of class certification are possible;[8] or

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would recommence.

[8] To say that the statute of limitations remains "tolled" this entire time is not completely accurate, because the majority apparently contemplates that no individual suits may be filed in the time period falling between options 1 and 2. The instant case provides an example. The Armstrong plaintiffs filed this suite more than ninety days after the district court's order dismissing them from the *Carmichael* class action; thus, they are too late to exercise option 1. However, their suit was filed before the *Carmichael* case reached final judgment; thus, they are too early to exercise option 2. Unwary plaintiffs who file suit in the interim period between options 1 and 2 will have their individual suits dismissed: should the dismissal be with prejudice (because the statute of limitations has expired), or without prejudice (because under option 2 the statute of limitations will resurrect after the named plaintiffs' case reaches final judgment)? The majority apparently contemplates that

(3) They may move to intervene in the named plaintiffs' case in order to pursue an interlocutory appeal of the class certification decision.[9] In this option, as in option 1, the majority apparently contemplates that the tolled statute of limitations would recommence its running at the time of the district court's order denying class certification, but would cease running and be tolled again when the claimant moves for an interlocutory appeal.[10] If

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the dismissal would be with prejudice. Maj.Op. at 3461 ("If we applied this new rule of law to this case, section 626(e) would bar the Armstrong plaintiffs' individual actions. . . ."). Thus, the unwary plaintiff who files an individual suit late is barred forever, but an individual plaintiff who waits pursuant to option 2 is not barred.

[9] If the named plaintiffs file an interlocutory appeal regarding the denial of class certification, do the putative class members still have to intervene in order to take advantage of option 3?

[10] I infer that the running of the statute of limitations recommences when the district court denies class certification. *See supra* note 4. However, if the statute of limitations does recommence at the time of the district court's order denying class

an interlocutory appeal is permitted and the district court is affirmed, then the majority explains that the running of statute of limitations recommences.[11] If the district court declines to certify the issue for appeal or if an interlocutory appeal is not accepted, the majority apparently contemplates that the tolling ceases and the running of the statute of limitations recommences.[12] If the recommended

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certification, then the statute would clearly have expired by the time of final judgment in the named plaintiffs' case; however, option 2 contemplates a resurrection of the statute of that time. Does the statute of limitations run for purposes of options 1 and 3, but not for purposes of option 2? *See supra* note 8.

11 The majority does not clarify at what exact point the statute of limitations begins to run again after an unsuccessful appeal. *See supra* note 7.

12 I infer this point from the majority's description of option 3, i.e., the language that the claimant may file an individual lawsuit "within the time remaining." In this situation, it is unclear exactly when the statute of limitations recommences. It probably begins to run again when the district court enters the order denying permission to file an interlocutory

statute of limitations expires before the claimant files an individual suit, the claimant may exercise option 2 (i.e., file suit after final judgment in the named plaintiffs' case - at which time the expired statute of limitations becomes resurrected).

From the foregoing discussion, it appears that the majority's array of options will generate confusion and uncertainty.

In sum, I submit that the majority's approach to this case is inconsistent with precedent and the relevant policy considerations, and also contains ambiguities and complexities. Respectfully, I dissent.

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appeal (or, if the district court grants such permission, when the appellate court enters an order refusing to entertain an interlocutory appeal).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-3255

D.C. Docket No. 94-1066-CV-ORL-18

DAVID M. ARMSTRONG, L. BENSON BARGER, WALLACE D. BLACK, HOWARD BROOKS, JERRY A. BUDD, SONJA M. CARTER, DOMINICK C. CIZEK, CAROLD . CLARKE-ILEY, CHARLES H. DAVIS, KENNETH O. GIESSUEBEL, HEROLD P. GLASER, ROBERT A. HAVLISH, KUMAR HINDUJA, JOSEPH C. JETT, GLENN E. JOHNSON, ROBERT C. LERCHE, CALVIN N. LIGHTNER, GEORGE W. MCGUIRK, JAMES W. MCLEAN, WILLIAM G. MURPHY, DONALD L. PRASKY, CLARK C. RAINS, KENNETH A. RICHARDS, RUSSELL G. ROBERTS, LINDA L. RYAN, VICTOR W. SHAW, LINTON W. SMITH, MICHAEL SYLVESTRI, DELBERT S. TURNER, EDWARD W. WALSH, JOSEPH W. WILLIAMSON,

Plaintiffs-Appellants,

versus

MARTIN MARIETTA CORP.,
MARTIN MARIETTA TECHNOLOGIES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 16, 1998)

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, AND BARKETT, Circuit Judges.*

*Circuit Judges Frank M. Hull and Stanley Marcus became members of the court after this case was argued and taken under submission. They elected not to participate in this decision.

TJOFLAT, Circuit Judge.

In Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 103 S.Ct. 2392 (1983), the Supreme Court held that the commencement of a class action suspends the applicable statute of limitations for all asserted members of the putative class "until class certification is denied." Id. at 354-55, 103 S.Ct. at 2397-98. The question presented in this case is whether, in the absence of controlling authority, the statute of limitations begins to run again immediately upon the district court's entry of the interlocutory order denying class certification,[1] or whether the

[1] The district court's denial of class certification is an interlocutory order, not reviewable as of right until after the entry of final judgment. See Coopers & Lybrand v. Livesay, 437 U.S.

statute of remains tolled through final judgment in the former class action and completion of an appeal from the order denying class certification.[2] The appellants advocate the latter rule, and a divided panel of this court adopted a variation that rule.[3] For the reasons

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463, 467-69, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978).

[2] The scope of our holding today is limited. Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983), establishes the proposition that, in cases brought under 42 U.S.C. § 1983, state law on tolling will control the issue we address today. Federal statutes that specifically provide for suspension of the statute of limitations, such as the Clayton Act, see 15 U.S.C. § 16(i), will of course control when they are applicable. Our holding today therefore establishes a rule of decision for this circuit that applies only when no federal statute or state law controls.

[3] The dissent apparently would have us adopt a variation of that rule. The precise contours of both the panel's holding and of the dissent's preferred holding are unclear. As discussed infra Part III, we prefer a clear rule that operates early in the litigation, and that settles the tolling question with regard to all parties, as opposed to a

set forth below, we hold that the tolling of the statute of limitations ceases when the district court enters an interlocutory order denying class certification.

I.

This case arises under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq, (1994) (the "ADEA"). The thirty-one appellants in the instant case are former Martin Marietta[4] employees who lost their jobs between 1992 and 1993. (Two other appellants, Myrtle Y. Redding and Marlon K. Tarter, have been dismissed from this appeal pursuant to joint stipulation of the parties.) Following their

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complex of vague rules under which the tolling period will be indeterminate and almost certainly very long.

4 It is unclear from the record on appeal whether appellee Martin Marietta Corporation or appellee Martin Marietta Technologies, Inc., was the employer in this case, although Martin Marietta Corporation asserts that all the appellants were employees of the subsidiary Martin Marietta Technologies and not of the parent corporation. It is unnecessary for us to decide this issue, however. We therefore use the name "Martin Marietta" to refer to both parties.

terminations, twenty-nine appellants filed timely charges of age discrimination with the Equal Employment Opportunity Commission (the "EEOC"), as is required by statute. See 29 U.S.C. § 626(d) (providing that a person who wishes to bring a civil action against his or her employer pursuant to the ADEA must first file a timely charge of discrimination with the EEOC). Three appellants--Clarke-Iley, Johnson, and Shaw--did not file EEOC charges.

At various times, the EEOC notified each appellant (other than Clarke-Iley, Johnson, and Shaw) that his or her charge of age discrimination was dismissed. Receipt of such notice triggers the statute of limitations for bringing a civil action in court, and the plaintiff must then file suit within ninety days. See 29 U.S.C. § 626(e).[5]

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[5] Section 626(e) reads in pertinent part:

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section. . . against the respondent named in the charge with in 90 days after the date of the receipt of such notice.

This ninety-day limitations period is tolled, however, while the plaintiff is a putative member of a class action. See Crown, Cork, 462 U.S. at 353-54, 103 S.Ct. at 2397-98. Twenty-eight of the thirty-one appellants opted into Carmichael v. Martin Marietta Corp., Case No. 93-434-CIV-ORL-19, an age discrimination class action that was already proceeding in the Middle District of Florida, on June 4, 1993.[6]

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29 U.S.C. § 626(e).

The ninety-day statute of limitations applies in the instant case because all of the adverse employment decisions at issue occurred after November 21, 1991, the effective date of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991), which altered the statute of limitations applicable to ADEA cases. The previous statute of limitations for ADEA cases was two years from the date of the adverse employment decision, or three years from that date for willful violations. See 29 U.S.C. § 626(e)(1) (repealed 1991); 29 U.S.C. § 255. See also Grayson v. K Mart Corp., 79 F.3d 1086, 1100 (11th Cir. 1996).

6 Class actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class actin mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994).

The remaining three appellants--Davis, Havlish, and Hinduja--were named plaintiffs in the Carmichael action.

On April 7, 1994, the district court in Carmichael determined that the appellants were not "similarly situated"

Section 216(b) provides for a class action where the complaining employees are "similarly situated." However, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Id. See also LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (explaining the fundamental difference between the opt-in class action under section 216(b) and the opt-out class action under Federal Rule of Civil Procedure 23).

The sparse record on appeal in the instant case does not satisfactorily establish the exact date or dates on which the appellants opted into the Carmichael class action. Construing the facts in the light most favorable to the appellants (the non-moving parties in Martin Marietta's motion for summary judgment), we assume arguendo that all appellants opted into the class on June 4, 1993--the date when the Carmichael class action complaint was filed. The record on appeal presents no conclusive evidence to the contrary.

to the other Carmichael plaintiffs. The Carmichael court therefore certified a plaintiff class that did not include as members the appellants in the instant case. The court then dismissed the claims of appellants Davis, Havlish, and Hinduja without prejudice, and denied the remaining appellants' requests to opt into the Carmichael class. None of the appellants requested leave to file an interlocutory appeal from that order under 28 U.S.C. § 1292(b).[7]

On October 11, 1994, more than ninety days after the Carmichael court's partial denial of class certification, the thirty-one appellants and fourteen additional plaintiffs (including former appellants Redding and Tarter) filed the complaint that commenced the instant action in the district court. On October 25, 1994, an amended complaint added a forty-sixth plaintiff, appellant Wallace Black.

On January 17, 1995, Martin Marietta filed a motion for partial summary judgment against the thirty-one

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The Carmichael action is still an active lawsuit as of the date of this opinion. No judgment was ever entered under Fed.R.Civ.P. 54(b) with regard to the dismissal of appellants Davis, Havlish, and Hinduja from the Carmichael action, and that dismissal remains non-final and non-appealable.

appellants, on the ground that they had failed to file their individual lawsuits within ninety days after their dismissal from the Carmichael class action. Martin Marietta also sought summary judgment against appellants Clarke-Iley, Johnson, and Shaw on the alternative ground that each had failed to file a charge of age discrimination with the EEOC within 300 days of the alleged discrimination.

On March 22, 1995, a magistrate judge issued a report recommending that the district court grant Martin Marietta's motion for partial summary judgment. The magistrate judge concluded that the ninety-day statute of limitations, which was tolled while the appellants were putative members of the Carmichael class action, recommenced when the Carmichael court dismissed their claims. Therefore, because the appellants' instant claims were filed more than ninety days after the dismissal in Carmichael, those claims were barred by the statute of limitations. The magistrate judge rejected Martin Marietta's alternative ground for partial summary judgment against Clarke-Iley, Johnson and Shaw, concluding that this circuit's "piggybacking" rule excused them form filing charges of discrimination with the EEOC. See Grayson v. K Mart Corp., 79 F.3d 1086, 1101-02 (11th Cir. 1996) (holding that an individual who did not file an EEOC charge may opt into an ADEA class action by "piggybacking" onto a

timely charge filed by one of the named plaintiffs, provided that the claims of the named plaintiff and the piggybacking plaintiff arise out of similar discriminatory treatment in the same time frame).[8]

On May 10, 1995, the district court adopted the magistrate judge's report and recommendation, and granted partial summary judgment against the thirty-one appellants. On September 14, 1995, the district court amended its order and replaced the partial summary judgment with a final judgment pursuant to Federal Rule of Civil Procedure 54(b). This appeal followed.

II.

The primary issue on appeal is whether the district court was correct in holding that the statute of limitations, which was tolled while the appellants were putative members of the class action, resumed running when the Carmichael court dismissed the appellants' claims in that case. We hold that the limitations period for filing an individual suit (and for

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[8] Because we hold that the district court correctly granted summary judgment against appellants Clarke-Iley, Johnson and Shaw, see infra part IV, we do not address Martin Marietta's argument that the district court misapplied the piggybacking rule.

intervening in an extant action) did so resume. We therefore affirm the decision of the district court with regard to almost all of the appellants.[9]

The ADEA's statute of limitations requires the plaintiff to file suit within ninety days after receiving notice that the EEOC has dismissed the plaintiff's age discrimination charge. See 29 U.S.C. § 626(e). Membership in a pending class action, however, tolls the ninety-day period for filing an individual lawsuit. See Crown, Cork, 462 U.S. at 353-54, 103 S.Ct. at 2397-98. The purpose of such tolling is to encourage class members reasonably to rely on the class action to protect their rights. Without tolling, class members would have to take action prior to the running of the statute of limitations in order to protect themselves in case class certification is later denied, even when they may reasonably expect to receive relief through the already-filed class action. See id. at 350-51, 103 S.Ct. at 2396; see also Griffn v. Singletary, 17 F.3d 356, 360 (11th Cir. 1994) ("Insofar as the individual claims are concerned, putative class members should be entitled to rely on a class action as

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[9] As explained in detail infra part IV, we reverse the district court's entry of summary judgment against appellants Armstrong, Cizek, Richards and Walsh.

long as it is pending."). Once the district court enters the order denying class certification, however, reliance on the named plaintiffs' prosecution of the matter ceases to be reasonable, and, we hold, the excluded putative class members are put on notice that they must act independently to protect their rights. See United Airlines, Inc. v. McDonald, 432 U.S. 385, 399, 97 S.Ct. 2464, 2472, L.Ed.2d 423 (1977) (Powell, Jr., dissenting).

The appellants, however, argue that the statute of limitations should continue to be tolled, even after the district court's denial of class certification, because the denial of certification in an interlocutory order may be reversed by the district court at any time before final judgment, or by the court of appeals after final judgment, or, in rare cases, on interlocutory review. We disagree. No reasonable person would rely on the hope that either the district court or this court might someday determine that the suit should have proceeded as a class action.

When the district court denies class certification,[10] the named

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In the instant case, the Carmichael court did not deny class certification altogether; rather, it certified a narrow class that did not include the

plaintiffs no longer have a duty to advance the interests of the excluded putative class members. See Fed.R.Civ.P. 23(c)(1), advisory committee's note to 1966 amendment (explaining that the trial court's order denying class certification "strip[s] [the suit] of its character as a class action, "thus requiring the litigation to proceed as a non-class action, even though the district court may change its mind and certify a class at any time before a decision on the merits); Pearson v. Ecological Science Corp., 522 F.2d 171, 177 (5th Cir. 1975) (rejecting the argument that the interlocutory nature of the district court's order denying class certification requires the named plaintiffs to exercise a continuing fiduciary duty to the putative class members).[11] Although it is possible that the district court may reconsider its order denying class

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appellants. This of course amounted to a denial of class certification as to the appellants. For simplicity's sake, we refer in the text to the more common situation, where a district court denies class certification altogether.

[11] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

certification, or that an appellate court may later reverse it, district courts have broad discretion with respect to such rulings, and denials of class certification usually stand. See e.g., Jones v. Firestone Tire and Rubber Co., Inc., 977 F.2d 527, 531, 535 (11th Cir. 1992) (citing cases for the proposition that "[a] district court's denial of class certification will not be disturbed absent an abuse of discretion" and affirming denial of class certification), cert denied, 508 U.S. 961, 113 S.Ct. 2932 (1993); see also, e.g., Forehand v. Florida State Hosp. at Chattahoochee, 89 F.3d 1562 (11th Cir. 1996) (affirming decertification of plaintiff class); Hudson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996) (affirming denial of class certification); Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566 (11th Cir. 1992) (same); Ray v. United States Dept. of Justice, 908 F.2d 1549 (11th Cir. 1990) (same); Palmer v. BRG of Georgia, 874 F.2d 1417 (11th Cir. 1989) (same). Indeed, a review of this court's published case law reveals that one must go back to 1987--over a decade ago--to find a case in which this court squarely reversed a district court's denial of class certification on grounds that the district court abused its discretion.

See Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987).[12] Thus, reliance on the possibility of a reversal of the court's certification decision is ordinarily not reasonable. We therefore conclude that continued tolling of the statute of limitations

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[12] Reconsideration and reversal of a denial of class certification by the district court is also rare. A recent study conducted by the Federal Judicial Center found that, of the cases studied:

1) motions for reconsideration of a denial of class certification were filed in only 4% of cases in which certification was denied;

2) of those cases in which a motion for reconsideration was filed, the motion was denied in 72% of the cases; and

3) in the remaining 28% of the cases, the district either took some other action or, for various reasons, did not rule on the motion for reconsideration.

See Thomas E. Willging, et al., "An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges," 71 N.Y.U.L. Rev. 74, 113-14 (1996). In sum, motions for reconsideration of a denial of class certification are granted in less than 3% of cases in which certification is denied.

after the district court denies class certification is unnecessary to protect any reasonable reliance by putative class members on their former class representatives.

Case law from the Supreme Court and several federal appellate courts also indicates that the tolling period should cease upon denial of class certification. The plain language of Crown, Cork itself clearly implies that tolling is to end upon the district court's denial of class certification. The Crown, Cork Court wrote: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." Crown, Cork, 462 U.S. at 354, 103 S.Ct. at 2397-98. The dissent would have us read the word "denied" in the above passage to mean (among other things) "denied, appealed, denied again, appealed (perhaps) again, and denied again." Even if we were to inclined to divine so much from that one word, "denied," we could not do so in light of the fact that in the very next sentence the Court suggests that putative class members who have been denied certification might "intervene as plaintiffs in the pending action." Id. at 354, 103 S.Ct. at 2398. IF, as the dissent advocates, we are to read "denied" to mean "finally denied, after all hope for reversal on appeal is

gone," then there will rarely be a "pending action" into which the disappointed putative class members might thereafter intervene.[13] We therefore read Crown, Cork to imply strongly, if not to hold, that tolling of the statute of limitations ends upon the district court's denial of class certification.[14]

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), provides further guidance from the Court. In American Pipe, the State of Utah filed a class action antitrust complaint with just eleven days before the limitations period expired. Several months later, the district court entered an order denying class certification. See id. at 541-43, 94 S.Ct. at 760-61. Eight days after that order was entered, several state and local agencies that had been putative class members moved to

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[13] As explained infra part III, review of class certification decisions usually follows a final judgment.

[14] Because we read Crown, Cork clearly to imply that the tolling of the statute of limitations should, in the absence of controlling authority to the contrary, end upon the district court's denial of class certification, we refer to that rule of decision, for brevity's sake, as the "Crown, Cork" rule.

intervene in the action and become plaintiffs. Id. at 543-44, 94 S.Ct. at 761. THe Supreme Court stated:

> that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character. The class suit. . . was filed with 11 days yet to run in the [limitations] period. . .and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of [the] order, it follows that the motions were timely.

Id. at 561, 94 S.Ct. at 770 (emphasis added). In American Pipe, the parties did not argue that tolling should continue through appeals.[15] It thus

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15 The primary reason why this issue was not addressed in American Pipe, we imagine, was because, in that case, the Clayton Act provided not only a controlling statute of limitations but also an instruction regarding tolling--specifically, that tolling would be "suspended" during the pendency of the class action. See id at 561, 94 S.Ct.

might be said that the Court did not squarely reject such an argument. The Court, however, clearly assumed that tolling should end when the district court denies class certification, not after the appeals process has run and some later final order is entered.

The Supreme Court's decision in United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. at 2464, 53 L.Ed.2d 423 (1977), also strongly suggests that the tolling of the statute of limitations ceases as soon as the district court denies class certification. In that Title VII case,

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at 770. The Court read this statutory language to direct that the tolling period end upon the district court's denial of class certification. See id. It therefore might be said that American Pipe's clear implication that tolling should end upon denial of certification below should be honored only when the Clayton Act's limitations provisions control. We read American Pipe, however, as establishing a general federal rule of decision--that the limitations period will be tolled while a class action is pending--pursuant to an historical "judicial power to toll statutes of limitation in federal courts," see id. at 558, 94 S.Ct. at 768, and as explained in the text, we also read the Court's opinion as assuming that the rule we adopt today is the "default rule."

the district court denied class certification and the named plaintiffs thereafter settled their claims against the defendant. Eighteen days after the district court entered a judgment of dismissal based on the settlement, a disappointed putative class member filed a motion to intervene for the sole purpose of appealing the district court's earlier denial of class certification. See id. at 388-90, 97 S.Ct. at 2466-67. The Supreme Court held that the motion was timely because it was filed "within the [thirty-day] time period in which the named plaintiffs could have taken an appeal." Id at 396, 103 S.Ct. at 2471. In its analysis, the Court addressed the defendant's argument that the intervenor had no interest in the litigation because the statute of limitations has expired. The Court emphasized that the purpose of the motion was to appeal the denial of class certification, and not to litigate an individual claim:

> This [statute of limitations] argument might be persuasive if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim. . . for she then would have occupied the same position as the intervenors in American Pipe. But the later motion to intervene in this case was for a wholly different purpose. That purpose was to obtain appellate review of the District

> Court's order denying class action status. . . and the motion complied with, as it was required to, the [thirty day] time limitation for lodging an appeal . . . . Success in that review would result in the certification of a class, the named members of which had complied with the statute of limitations; the respondent is a member of that class against whom the statute had not run at the time the class action was commenced.

Id. at 392, 97 S.Ct. at 2468-69. The Court's rationale strongly implies that the statute of limitations for filing an individual suit (and for intervening to litigate one's claim) begins to run again as soon as the district court denies class certification--although an excluded putative class member whose individual claim is barred by the statute of limitations may still intervene for the purpose of appealing the denial of class certification after final judgment.[16]

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We note that, in at least some cases, the named plaintiff also may appeal the denial of class certification, even if she prevails on the merits below, settles her claim, or otherwise ceases individually to have a controversy with the defendant. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427

Finally, as the dissent concedes, language in Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983), is in tension with the dissent's position. The specific issue before the Court in Chardon was whether a Puerto Rican statute of limitations would control in a case brought under 42 U.S.C. § 1983. See id. at 651-52, 103 S.Ct. at 2613-14. The Court concluded that the Puerto Rican statute, and state statutes of limitations generally, would control in actions under section 1983 because the

> federal interest in assuring the efficiency and economy of the class action procedure. . . is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits, or, in the absence of a statute,

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(1980) (holding that named plaintiffs' case or controversy was not mooted, and that they might appeal denial of class certification, even after entry of final judgment in their favor but over their objections); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 408, 100 S.Ct. 1202, 1215, 63 L.Ed.2d 479 (1980) (holding that named plaintiff may appeal denial of class certification even when his own claim has been rendered moot).

> the time provided under the most closely analogous state tolling statute.

Id. at 661, 103 S.Ct. at 2618. As stated, Chardon dealt with a question of the applicability of state law under section 1983, and the Court's decision was therefore motivated in large part by concerns of federalism; in short, the Court concluded that the federal interest in the efficiency of federal class action procedure was satisfied as long as a putative class member in federal court had as long to file his individual suit as he would have had in state court.

The instant case presents no concerns of federalism, but the Court's holding in Chardon is still instructive. Chardon held that the federal interest in the efficiency of federal class action procedure was satisfied by the application of state statutes of limitations only "after class certification is denied" (and the facts of the case make it clear that the Court was referring to the district court's denial of certification). Id. (emphasis added). We therefore read Chardon to draw a distinction between 1) the federal interest in encouraging reliance upon the class action mechanism prior to denial of certification in the district court, and 2) the federal interest in doing so after denial of certification in the district court. The federal interest in encouraging reliance upon

the class action mechanism prior to denial of certification is strong, because reliance on the mechanism is reasonable and saves many individual suits and motions for intervention from being filed; for this reason, as the Chardon Court noted, American Pipe established tolling of limitations during the pendency of a class action. See id. at 658-60, 103 S.Ct. at 2617-18. The federal interest in encouraging reliance upon the class action mechanism after denial of certification in the district court, however, is at best very weak (as explained infra, we believe it to be virtually non-existent); this, we believe, is the central reason why the Chardon Court allowed state tolling rules to trump the asserted federal interest in class action efficiency after the denial of certification in the district court but not before.

In addition to this guidance from the Supreme Court, several appellate courts have explicitly rejected the argument that the statute of limitations for filing an individual claim should remain tolled through an appeal of the denial of class certification. See Nelson v. County of Allegheny, 860 F.Supp. 1080, 1084 (W.D. Pa. 1994) ("In our view, . . . once certification has been denied by the district court, class members cannot reasonably rely on the existence of the suit to protect their rights, and they must timely assert claims in their individual capacities."), aff'd 60 F.3d 1010 (3d

Cir. 1995) (reviewing state law and holding that, in federal courts, the tolling of the statute of limitations ceases upon the entry of the district court's order denying class certification, and does not continue through completion of the appeals process), cert. denied, ___ U.S. ___, 116 S.Ct. 1266, 134 L.Ed.2d 216 (1996); Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 390 (5th Cir.) (per curiam) (holding that the statute of limitations begins to run again upon entry of the district court's order denying class certification, even if the district court later reconsiders the issue and certifies a class), cert. denied, 493 U.S. 821, 110 S.Ct. 79, 107 L.Ed.2d 45 (1989); Andrews v. Orr, 851 F.2d 146, 149-50 (6th Cir. 1988) (holding that the instant suit 'ceased to be a class action," and tolling ended, upon entry of order denying class certification); Fernandez v. Chardon, 681 F.2d 42, 48 (1st Cir. 1982) ("[T]olling would have ended, and the remaining portion of the limitations period would have recommenced running . . . when the district court declined to certify the class."), cert. granted sub nom Chardon v. Fumero Soto, 459 U.S. 987, 103 S.Ct. 339, 74 L.Ed.2d 382 (1982); cert. denied sub nom Fumero Soto v. Chardon, 459 U.S. 989, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982), aff'd Chardon v. Soto, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983); see also Korwek v. Hunt, 827 F.2d 874, 877-79 (2d Cir. 1987) (holding that tolling under

American Pipe "does not apply to permit a [disappointed putative class member] to file a subsequent class action following a definitive determination of the inappropriateness of class certification," and holding that a district court's determination that a class action would be unmanageable constitutes such a "definitive determination.");[17] but see Jimenez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975) (stating, in dictum, court's supposition that an appeal from a denial of class certification would further toll the statute of limitations).[18]

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[17] The Second Circuit in Korwek also noted that "[t]he motion for amendment [of the district court's order denying certification] under Rule 23(c)(1), a mechanism which protects scarce administrative resources while ensuring re-evaluation of a frequently complex question, provides adequate opportunity for" putative class members expediently to address asserted errors in the district court's initial class certification decision. See Korwek, 827 F.2d at 879. We note that a disappointed putative class member could exercise this option even after filing his individual suit, and that a pending motion for amendment could be a ground of a stay of the individual suit.

[18] The dissent also cites several district court opinions, see West Haven

III.

Practical considerations also lead us to conclude that, if class certification is denied in whole or in part, the statute of limitations begins to run again as to exclude putative class members as of the date of the district court's order denying certification.

The district court's class certification decision, which defines

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Sch. Dist. v. Owens-Corning Fiberglass Corp., 721 F.Supp. 1547, 1555 (D.Conn. 1988); Byrd v. Travenol Lab., Inc., 675 F.Supp. 342, 347 (N.D. Miss. 1987); Davis v. Bethlehem Steel Corp., 600 F.Supp. 1312, 1316 (D. Md.), aff'd on other grounds, 769 F.2d 210 (4th Cir.), cert. denied, 474 U.S. 1021, 106 S.Ct. 573, 88 L.Ed.2d 557 (1985), and an opinion of the Utah Supreme Court, American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 762 (Utah 1992), in support of its argument. We believe the various district court statements cited to have been wrongly decided. We also note that the Utah Supreme Court case contains no rationale, and instead bases its holding on Jimenez and the above-cited district court decisions alone, without citing or discussing Calderon, Andrews, or Fernandez, see id at 761-62; we therefore conclude that the American Tierra court misread federal law.

which claimants are class members and which are not, is not a "final decision" within the meaning of 28 U.S.C. § 1291, because an excluded putative class member is free to proceed with his individual claim. Class certification decisions are therefore not appealable as a matter of right. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 467-69, 98 S.Ct. 2454, 2457-58 (1978). "Such an order is [interlocutorily] appealable, therefore, only if it comes within an appropriate exception to the final-judgment rule." Id. at 467, 98 S.Ct. at 2457. A class certification decision therefore could come before the Court of Appeals in one of three ways.[19] The most common way is review after a final judgment in the case, be it after trial, after summary judgment or dismissal, or on a partial final judgment under Fed.R.Civ.P. 54(b).[20] A

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[19] Note that, under Rule 23, there are numerous reasons why a district judge might deny class certification. For example, the named plaintiff may not be an adequate class representative; there may be too few putative class members to make a class action worthwhile; or the putative class claims may be too diverse to make a class action workable. See Fed.R.Civ.P. 23(a), (b).

[20] Rule 54(b) provides:

Judgment Upon Multiple Claims or

much narrower route to the court of appeals is interlocutory review of the district court's class certification order under 28 U.S.C. § 1292(b).[21] An

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Involving Multiples Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed.R.Civ.P. 54(b). A final judgment under Rule 54(b) will not be available to excluded putative class members, because they are not party plaintiffs and therefore present no claim upon which the district court can enter judgment.

[21] Section 1292(b) provides:

When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

even rarer basis for appellate review of a district court's certification decision is this court's mandamus jurisdiction.

A.

Let us consider the possibility of mandamus review first. In In re Estelle, 516 F.2d 480 (5th Cir. 1975), we stated that the writ of mandamus may issue to correct a clear abuse of discretion or the failure to carry out a ministerial task.[22] We may issue the

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termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

22 Estelle stated that:

The Writs of Mandamus and Prohibition. . . are reserved for really extraordinary

writ "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion." In re Temple, 851 F.2d 1269, 1271 (11th Cir. 1988). We may issue the writ to direct a district court to take a particular action with regard to class certification only when 1) the district court's certification decision "inflict[s] irreparable harm in that an appeal at the end of the case would be ineffectual," and 2) the certification order constitutes, at a

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causes, and should be issued only when the right to such relief is clear and indisputable. To some extent they are supervisory in nature and are used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. They are not to be used as a substitute for appeal, or to control the decision of the trial court in discretionary matters.

The Writ is thus a drastic remedy, that must not be used to regulate the trial court's judgment in matters properly left to its sound discretion, but that may be available to confine the lower court to the sphere of its discretionary power.

Estelle, 516 F.2d at 482 (internal citations and quotations marks omitted).

minimum, a clear abuse of discretion.[23] 5 James Wm. Moore et al., Moore's Federal Practice § 23.61[9][c], 23-290 (3d ed. 1997) (citing Temple, 851 F.2d 1269). These conditions are rarely met; class certification decisions are left to the sound discretion of the district court, see Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc. (IMPACT) v. Firestone, 893 F.2d 1189, 1197 (11th Cir. 1990) (Edmondson, Jr., concurring in part and dissenting in part), and in most cases, the certification issue can be effectively reviewed on appeal after final judgment. See e.g., Plekowski v. Ralston-Purina Co., 557 F.2d 1218, 1220 (5th Cir. 1977). In any case, excluded putative class members are not "irreparably harmed" by a denial of class certification, because they may still intervene in the ongoing action or file their own suits.

We have in the past issued mandamus to direct a district court to decertify an improperly certified class, when the certification of that class was a clear abuse of discretion. See e.g., Temple,

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23 A district court's class certification decision, in and of itself, will constitute a "clear usurpation of power" or a failure to carry out a ministerial task only in the most unusual of circumstances.

851 F.2d 1269; In red Dennis Greeman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987). These cases, however, presented circumstances not present in the instant case or in most cases,[24] and moreover, for a court of appeals to direct the certification of a class after the district court has denied certification is even less likely than for a court of appeals to direct the decertification of a class after the district court has granted certification.[25] In short, mandamus

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24 Both Temple and Greenman involved a district court's certification of mandatory classes in mass tort cases; when the district court has certified a non-mandatory class, the argument that the court has clearly abused its discretion, and that mandamus relief is appropriate, will be much more difficult, because the district court's decision will have left other avenues of relief. Moreover, as the Temple court noted, "any certification of a mandatory class in a mass tort case [such as Greenman or Temple], especially one predominantly involving issues of liability and compensation, must be reviewed with utmost scrutiny [because] [s]uch certification clearly implicates the Anti-Injunction Act." Temple, 851 F.2d at 1271 (citations omitted).

25 Courts of appeals are less likely to direct the certification of a class than

review of a district court's denial of class certification will be very rare, and reversal of such a denial pursuant to our mandamus jurisdiction will be extremely so; a review of this court's published case law of the last twenty years reveals no case in which we overturned a district court's denial of class certification pursuant to our mandamus jurisdiction.

A.

Let us next consider the possibility of appellate review of a denial of class certification pursuant to 28 U.S.C. § 1292(b). Section 1292(b) authorizes the courts of appeals to exercise interlocutory review of district court orders only when the lower court certifies for review a question of law, and not when the lower court attempts to certify only discretionary matters such as the

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to direct a decertification simply because it is easier to notice abusively exercised discretion, or legal error, in a certification already granted, than it is to pick on hypothetical class definition, from a myriad of possible definitions, and confidently conclude that that one definition is so clearly the right one that the district court abused its discretion in failing to certify that one class.

decision to certify a class vel non.[26] See 28 U.S.C. § 1292(b) (1994) (stating that a district court may certify for interlocutory appeal "a controlling question of law as to which there is substantial ground for difference of opinion") (emphasis added); Link v. Mercedes-Benz of North America, 550 F.2d 860, 862-63 (3d Cir. 1976) (holding that "section 1292(b) is not designed for review of factual matters but addresses itself to a 'controlling question of law,'" and that a class certification decision "does not present a 'controlling question of law' to which this court should be hospitable under § 1292(b)"), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); see also Koehler v. Bank of Bermuda, Ltd., 101 F.3d 863, 866 (2d Cir. 1996) (citing Link in support of the proposition that "§ 1292(b) was not meant to substitute an appellate court's

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26 Class certification orders are also not among the sorts of interlocutory orders over which the courts of appeals have jurisdiction pursuant to 28 U.S.C. § 1292(a). See Wyatt v. Rogers, 92 F.3d 1074, 1081 (11th Cir. 1996). Class certification decisions may be reviewed under section 1292(a) only when they are integral to a district court's decision regarding an injunctive order, review or which is authorized by section 1292(a). See Plekowski, 557 F.2d at 1220-21 (11th Cir. 1997).

judgment for that of the trial court"). See also e.g., Andrews v. American Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996) (addressing legal issue of standing as well as discretionary Rule 23 issues); Delta Air Lines, 90 F.3d 451 (11th Cir. 1996) (addressing legal issue of district court's supplemental jurisdiction as well as discretionary Rule 23 issues); K Mart, 79 F.3d 1086 (11th Cir. 1996) (grounding review of grant of class certification on several specified, certified legal issues); Bohannon v. Allstate Ins. Co., 847 F.2d 740 (11th Cir. 1988) (reviewing class certification based on specified, certified issue of contract interpretation under Georgia law); Kirkpatrick, 827 F.2d 718 (11th Cir. 1987) (addressing "fraud-on-the-market" issue as well as Rule 23 issues in Rule 10b-5 securities fraud case); Tucker v. Phyfer, 819 F.2d 1030, 1033-35 (11th Cir. 1987) (affirming denial of class certification on grounds of mootness).[27]

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[27] This not to say that "no district court order involving some exercise of discretion may be reviewed in a § 1292(b) appeal," see Katz v. Carte Blanche Corp., 496 F.2d 747, 753 (5th Cir. 1974). It is instead to say that section 1292(b) does not authorize review of wholly discretionary orders, i.e., that the review must involve, and the district court must certify as appealable, "a controlling question of

Moreover, the availability of review under section 1292(b) is subject to both the district court's willingness to certify the matter for review and this court's willingness to hear the appeal. See 28 U.S.C. § 1292(b) (1994) (stating that, after certification of interlocutory appeal by district court order, "[t]he Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order"); see also Mason v. Stallings, 82 F.3d 1007, 1009-1010 (11th Cir. 1996) (noting that, where district court has denied § 1292(b) certification, review "is not open to" court of appeals); Luckenback Steamship Co. v. H. Muehlstein & Co., 280 F.3d 755, 757 (2d Cir. 1960) ("[I]n no event can [an] action be appealable" where there is no final judgment can where circuit court has denied to leave to appeal under § 1292(b).). Thus, appellate review of class certification

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law." Once the district court has certified a question of law for appeal and this court has granted leave to appeal, the entire order of the district court, including both purely legal questions and discretionary determinations, is subject to our review. See Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir. 1997).

decisions under § 1292(b) is and will be rare. Successful appeals under § 1292(b) may be expected to be rarer still; this court has not accepted a § 1292(b) appeal from a denial of class certification and reversed that denial

in over a decade.[28] See Kirkpatrick, 827

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It has also been suggested that a denial of class certification might be reviewable under the "collateral order doctrine" established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1940). That is not the case. The Supreme Court has settled this question conclusively:

> To come within the "small class" of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. Abney v. United States, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651; United States v. MacDonald, 435 U.S. 850, 855, 98 S.Ct. 1547, 1549, 56 L.Ed.2d 18. An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Fed.Rule.Civ.Proc. 23(c)(1). Second, the class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Mercantile Nat. Bank v.

F.2d 718 (11th Cir. 1987).

C.

Let us finally consider the third possible jurisdictional basis for appellate review of a denial of class certification--review after a final judgment in the case below. A denial of class certification is "a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment" pursuant to our jurisdiction under 28 U.S.C. § 1291. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63

Langdeau, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523 (1963). Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (emphasis added); see also Wyatt, 92 F.3d at 1081 (11th Cir. 1996).

L.Ed.2d 427 (1980).[29] The district court's class certification decision is reviewed only for abuse of discretion. See IMPACT, 893 F.2d at 1197.[30]

Review pursuant to section 1291, after entry of a final judgment, is by far the most common basis for appellate review of class certification decisions. See Willging et. al., 71 N.Y.U. L. Rev. at 170 (noting that the overwhelming majority of appeals in cases studied were from a final judgment or order). In this context, the dissent's preferred

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29 The final judgment supporting review of a class certification decision under section 1291 could arise in numerous ways: after settlement and dismissal, see e.g., Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671 (5th Cir. United B. 1982); after summary judgment, see e.g., Heaven v. Trust Co. Bank, 118 F.3d 735 (11th Cir. 1997); after trial, see, e.g., Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989); or pursuant to Fed.R.Civ.P. 54(b), as in the instant case.

30 The district court's reading of the law that controls its discretionary certification decision is of course reviewed de novo for error. As noted supra, rulings on such questions of law can also support a discretionary interlocutory appeal under 28 U.S.C. § 1292(b).

rule admittedly might lead a few disappointed putative class members to refrain from filing individual lawsuits prior to an eventual reversal of the district court's denial of class certification. The dissent's rule might thereby avoid some duplicitous, unnecessarily costly litigation in the few cases where we find the district court to have abused its discretion. But this small measure of added efficiency would come at too high a cost.

First, continuing to toll the statute of limitations through trial and through the entire appeals process would seriously contravene the policies underlying statutes of limitations. Statutes of limitations are intended to prevent "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944).[31] If we

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[31] Age discrimination cases are especially likely to grow stale, as many plaintiffs and witnesses are at or near retirement age when the litigation commences, and could be in failing health or deceased by the time a final judgment is entered and appellate review of the class certification decision has run its lengthy course.

accept the appellants' argument, the statute of limitations will remain tolled, in many cases, for several years. The case at bar, for instance--which comes to us upon the entry of a Rule 54(b) judgment, without trial--was initiated when the appellants opted into the already-extant Carmichael action almost five years ago.[32] See Nelson v. County of Allegheny, 60 F.3d 1010, 1013, (3d Cir. 1995) (holding that such an extended tolling period would be "unreasonable"), cert. denied sub nom Beddingfield v. County of Allegheny, ___ U.S. ___, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996). The potential length of the delay certainly increases the possibility that evidence will be lost, memories will fade, and witnesses will disappear. In short, the dissent's rule (to the extent that excluded putative class members might take advantage of

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32 See supra note 5.

it[33]) would leave cases in limbo for years at a time.

Moreover, the extended tolling period may be expected to prejudice many defendants because plaintiffs will be able to choose when to file their suits.[34] As the Court noted in American

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[33] The dissent's tolling rule, if utilized by disappointed putative class members, would leave them waiting for years for tolling to end, along with the defendants. We doubt whether many claimants would in fact delay their day in court by several years in hopes of success on appeal, simply because any such hopes are usually slight. As explained in the text, to the extent that claimants might be inclined to rely on appeals of the denial of class certification, such reliance is unreasonable and is to be discouraged. To the extent that excluded putative class members might in fact take advantage of the dissent's rule, they could be expected to do so in large part because of the rule's prejudicial effect on defendants. See discussion infra.

[34] By conditioning tolling upon the named plaintiffs' decision to appeal and upon putative class members' decisions to file individual suits, the dissent's rule would leave decisions regarding the tolling period in the hands, not of the court, but of plaintiffs and putative

Pipe, class action procedure prior to the 1966 revision of Rule 23 was criticized for allowing putative class members in some situations to wait until final judgment on the merits of an action before determining whether participation in the action was in their best interests. American Pipe, 414 U.S. at 545-47, 94 S.Ct. 762-63. Putative class members could thereby "benefit from a favorable judgment without subjecting themselves to the binding

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class members. The potential for abuse under such an arrangement is significant. Defendants, for instance, regularly extract waivers of the right to appeal from named plaintiffs at settlement, and named plaintiffs have a powerful incentive to grant such waivers; under the dissent's rule, the granting of such a waiver would presumably cause the limitations period to resume running--an unpleasant surprise for putative class members, whom the dissent wants to rely on the appeals process. The dissent's rule would also encourage plaintiffs and plaintiffs' counsel to file overly broad class complaints; if the limitations period may be tolled indefinitely merely by the filing of a class complaint, there will be an incentive to draw the putative class in the broadest terms possible, so as to toll limitations even as regards claimants who cannot reasonably expect to be included in any class.

effect of an unfavorable one." Id. at 547, 94 S.Ct. at 763. The dissent's preferred rule would make such abuse possible again.

The threat of such delay and such prejudice would cause many defendants not to contest motions for class certification. The costs to a defendant of this unlimited extension of the tolling period--not knowing when its exposure to claims of putative class members will end--may be such that the defendant forgoes a meritorious defense to certification and instead agrees to litigate all the putative class claims in the instant case. Thus, the dissent's rule would impose an unnecessary--and perhaps an intolerable--tax on the judiciary, as courts are forced to preside over large class actions as to which a meritorious defense exists but has not been proffered.

Although appeals from denials of class certification can take years, the certification decision itself should come early in the litigation. Rule 23 counsels early determination of motions for class certification. See Fed.R.Civ.P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained"). In fact, motions to certify are filed, on average, within three to four months after the filing of an action, and the

motions are ruled upon, on average, within three to eight months. See Willging et al., 71 N.Y.U.L. Rev. at 101-02. See also 28 U.S.C. § 476 (1994) (requiring motions pending for more than six months to be included in semi-annual report under Civil Justice Reform Act). If the district court acts seasonably in deciding the certification issue, the extension of the limitations period under the Crown, Cork rule should not be great. See American Pipe, 414 U.S. at 562, 94 S.Ct. at 770 (Blackmun, J., concurring) (noting that district courts can make the tolling rule more fair to defendants by making the class certification decision promptly). Therefore, if the district court's denial of certification triggers the resumption of the limitations period, then the litigants--named plaintiffs, potential class members, and the defendant--should know at an early stage in the litigation how long the statute of limitations will be tolled. In contrast, under the dissent's preferred rule, litigants often would have to wait for years for tolling to end. Waiting until the appellate process has run its course, or until the time for taking an appeal has expired, creates far greater uncertainty as to when the limitations period will resume running than the uncertainty, if any, created by the Crown, Cork rule.

D.

As the preceding discussion indicates, interlocutory appeals of denials of class certification are relatively uncommon and are very rarely successful. Therefore, reliance on the possibility of reversal upon an interlocutory appeal is unreasonable.[35]

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35 Proposed Federal Rule of Civil Procedure 23(f), holds the potential to change this analysis if passed in its current form. Proposed Rule 23(f) reads:

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

167 F.R.D. 559, 560 (1996). If the rule passes, and if it significantly increases the frequency of interlocutory appeals of class certification orders--a development which would depend in large part upon how this court chooses to exercise the discretion granted to it by the proposed rule--then we may revisit the decision taken today, and might for instance allow continued tolling of statutes of limitations during the pendency of an appeal under the new

This proposition is as true for the dissent as it is for disappointed putative class members; since interlocutory appeals are uncommon and rarely successful, the dissent's preferred rule would often toll the statute of limitations through a final judgment as well as through multi-issue appeals--a process that can take years--on the off chance that a few filings will be saved by the slim prospect of a

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rule. We decline, however, to speculate regarding how we might exercise our discretion under the proposed rule and to decide the instant case in reliance upon an as-yet unenacted rule.

The dissent also suggests that a stay of a district court's order denying class certification pending review under the proposed rule would operate to toll the limitations period until the interlocutory appeal has been settled. We do not find support for this proposition in the text of the proposed rule. In the absence of guidance, we do not hold that a stay of a district court's order denying certification would toll the limitations period, either under the proposed rule or under the law controlling our decision today. A stay of an order does not constitute a challenge to that order, and a stay of a denial of class certification in itself offers no reasonable hope for later reversal of the order.

successful appeal.[36] This is fundamentally different from Crown, Cork tolling of the limitations period during the pendency of the motion for certification in the district court. Crown, Cork tolling is short and saves numerous filings by encouraging reasonable reliance on the pending class action. Tolling under the dissent's proposed rule would be long and would save few filings by encouraging unreasonable reliance on the slim possibility of reversal after a long appeal. This is simply too high a cost for too little benefit.

Moreover, the dissent's analysis fails to delineate how its rule would operate when, as happens in perhaps the greatest number of class actions, the named plaintiffs (along with, perhaps, members of a partially-certified class) settle their claims after denial of certification. When, under the dissent's rule, does the statute of limitations resume running? When the stipulation of dismissal or the final judgment is entered? After appeal by the named plaintiffs (who now have little incentive to pursue years of appeals)? And what if disappointed

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[36] Note that the dissent's rule would justifiably save filings only when the district court has abused its discretion--that is, in the uncommon case.

putative class members seek to intervene, as in United Airlines, for the purpose of appeal? Should they be given the benefit of years of continued tolling, despite the fact that their chances for success on appeal are terribly slim? This is not the idle nit-picking. The earlier the event that triggers the resumption of the limitations period--say, the joint stipulation of dismissal--the greater the potential for prejudicial surprise of excluded putative class members.[37] The later that event--say, the final failure of an appeal by intervening putative class members--the greater the potential that cases will grow stale. The dissent anticipates that we might work these sorts of problems out in due course. We prefer to avoid these problems altogether, with a clear rule that operates early in the litigation

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The NAACP Legal Defense Fund, as amici curiae, have suggested that we today fashion a rule requiring the district courts to notify excluded putative class members of the court's denial of certification in all class actions, as is required in ADEA "opt-in" class actions. We regard this as an unworkable proposition and, in any case, we do not think it unjust to require that claimants who take advantage of Crown, Cork tolling also monitor developments in the district court and file individually when necessary.

and that settles the tolling question with regard to all parties at once.[38]

We therefore conclude that the pendency of a class action tolls the applicable statute of limitations only until the district court makes a class certification decision. If class certification is denied in whole or in part, the statute of limitations begins to run again as to those putative class members who were excluded from the class. In order to protect their rights, such individuals must seek to intervene in the pending action (like the plaintiffs in American Pipe), or file a separate individual action (like the plaintiff in Crown, Cork) before the time remaining in the limitations period expires. If the dismissed class member takes no such action within the

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38 In contrast, under the dissent's rule, the tolling period would vary widely from case to case--depending on whether the named plaintiffs settle, or prevail at trial and do not seek review through appeal or cross-appeal of the certification issue, or lose at trial and take all appeals due them. The limitations period would be dictated by the time it takes to bring a case to conclusion in the district court and to allow the appellate process to run, and by the plaintiffs' strategic decisions regarding which actions to take, and when.

remainder of the limitations period, then he may neither fie a suit in his own name nor intervene in the already-pending action. In such a situation, the dismissed class member's only avenue of relief is to wait until the pending action reaches final judgment, and then, like the plaintiff in United Airlines, file a timely motion to intervene for the limited purpose of appealing the district court's class certification decision.

The appellants argue that the rule we adopt will force disappointed putative class members to choose between 1) filing an individual lawsuit within the statute of limitations period or 2) exercising their right to appeal the denial of class certification. This does not have to be the case. A putative class member who wishes to preserve both rights should file her individual suit and immediately seek a stay of the individual suit pending the outcome of an appeal from the denial of class certification.[39] If, in the

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39 The disappointed putative class member might also seek consolidation of his case with the original class action pursuant to Fed.R.Civ.P. 42. The dissent's rule, we note, would frustrate the policy behind consolidation of cases: Most disappointed putative class members' individual suits would not be amenable to consolidation under the

judgment of the district (or state) court to whom the application for a stay has been made, the plaintiffs hopes for reversal of the initial denial of class certification are strong, and if the delay caused by the stay will not be too great, the court may, in its discretion, grant the stay; if the court believes that the chances of reversal are be slim or the delay caused by waiting for the appellate process to conclude will be too long (as will usually be the case), the stay will properly be denied, and the plaintiff will properly have to proceed individually. This is a just, efficient result.

IV.

In light of our conclusion that the limitations period recommenced when the

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dissent's rule, because under that rule, disappointed putative class members may choose to file their individual suits at any point during the years-long process of trial and appeal. Many of these individual cases would presumably be filed at widely different times, and consolidation would therefore not be practicable. In contrast, under the rule we adopt, the class certification decision and subsequent decisions to file individual suits--and therefore also decisions regarding consolidation of those suits--will come early in the litigation and all at roughly the same time.

district court dismissed appellants from the Carmichael class action, we now address whether any of the appellants complied with the applicable statute of limitations.[40]

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[40] The dissent argues that the rule we adopt today should not apply retroactively to the appellants. Retroactive application of a "new" rule of law may be avoided only if:

> 1) the decision adopting the rule does so "either by overruling clear past precedent or by deciding an issue of first impression the resolution of which was not clearly foreshadowed;" and
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> 2) "the application of the old rule in the instant case [does] not contravene the purpose and operation of the provision being interpreted;" and
>
> 3) "application of the new rule in the instant case [would] be inequitable."

McKinney v. Pate, 20 F.3d 1550, 1565 (11th Cir. 1994). The precedent discussed in the text clearly foreshadows the result we reach today. We therefore apply today's holding retroactively.

Civil actions under the ADEA must be filed within ninety days after the plaintiff receives notice of the EEOC's dismissal of the age discrimination charge. See 29 U.S.C. § 626(e) (1994). Three appellants (Davis, Havlish, and Hinduja) were named plaintiffs in Carmichael prior to their dismissal on April 7, 1994. Hinduja's employment at Martin Marietta was terminated on April 24, 1992; Davis' employment was terminated on May 8, 1992; and Havlish's employment was terminated Jan. 1, 1993. The inadequate record on appeal does not disclose when the Carmichael action was filed, or when these three appellants might have intervened therein. These three appellants' claims are certainly barred, however, even if we assume that Davis, Havlish and Hinduja filed motions to intervene in the Carmichael action immediately upon receipt of their right-to-sue letters from the EEOC. If these three appellants had filed immediately, they would have retained ninety days from the Carmichael court's April 7, 1994, dismissal order to which to bring suit. The instant lawsuit was not filed until October 11, 1994, which is well beyond the end of the ninety-day limitations period. Havlish's, Hinduja's and Davis' claims are therefore barred.

Twenty-two appellants (Armstrong, Barger, Brooks, Budd, Carter, Cizek,

Giessuebel, Glaser, Jett, Lerche,[41] Lightner, McGuirk, Murphy, Prasky, Rains, Richards, Ryan, Smith, Sylvestri, Turner, Walsh, and Williamson) received EEOC right-to-sue letters while they were still putative class members in the Carmichael action (i.e., they received their notices after they opted into the Carmichael class action on June 4, 1993, but before the Carmichael court's April 7 partial denial of certification). These twenty-two appellants thus retained ninety days from the Carmichael court's April 7, 1994, dismissal order in which to bring suit. Three other appellants (Black, Davis, and Roberts) received their EEOC notices before opting into the Carmichael class action; thus, they had less than ninety days from the Carmichael court's April 7, 1994, dismissal order in which to file suit. The instant lawsuit was not filed until October 11, 1994, which is well beyond the end of the limitations period with regard to all twenty-five

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[41] Appellant Lerche's EEOC notice is not in the record; however, an undisputed affidavit filed by the appellees indicates that the EEOC orally informed Lerche of the dismissal of his age discrimination charge while he was a putative member of the Carmichael class action. In any event, appellants do not argue that Lerche should be treated differently.

appellants named above. Their claims are therefore barred.

The record indicates that the EEOC notified McLean of the dismissal of his age discrimination charge on June 30, 1994--over two months after the Carmichael court's dismissal order. Accordingly, McLean had ninety days from the date on which he received the June 30, 1994, EEOC notice in which to file suit. Because the instant suit was filed on October 11, 1994, it is not timely as to appellant McLean.

Invoking the "piggybacking" rule, three appellants--Clarke-Iley, Johnson, and Shaw--never filed age discrimination charges with the EEOC.[42] Clarke-Iley, Johnson, and Shaw had 300 days from the date of their termination by Martin Marietta to file a charge with the EEOC. See 29 U.S.C. § 626(d) (1994) (providing that, in an ADEA case arising in a state that has its own fair employment practice agency, as does Florida, EEOC claims must be filed within 300 days of the allegedly illegal employment action). Shaw's employment with Martin Marietta was terminated on Sept. 25,

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42 Instead of filing their own EEOC charges, the three appellants relied on the timely-filed EEOC charge of Raymond T. McGoldrick, one of the named plaintiffs in the Carmichael class action.

1994; Johnson's was terminated on Oct. 2, 1992; and Clarke-Iley's was terminated on Oct. 9, 1992. All three then opted into the Carmichael action on June 4, 1993.[43] The EEOC administrative charge filing period was tolled as to Clarke-Iley, Johnson and Shaw during the pendency of their participation in the Carmichael class action--that is, from the time the Carmichael action was filed until the district court, on April 7, 1994, certified a class that did not include the appellants. See Griffin, 17 F.3d at 359-61 (11th Cir. 1994) (holding that "the [EEOC] charge-filing period for the individual claims asserted in [a Title VII class action is] tolled during the pendency of the class action"). Thus, Clarke-Iley, Johnson, and Shaw each had much less than 300 days after the entry of that order to file charges with the EEOC; specifically, Clarke-Iley had 64 days remaining in the limitations period when the district court denied certification on April 7, 1994; Johnson had 59 days left; and Shaw had 54 days

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43 Martin Marietta asserts that all three opted in much later than June 4, and that all three actually opted in after the 300-day EEOC filing period had elapsed. The inadequate record on appeal, however, does not establish this assertion. We therefore adhere to our assumption, see note 6, supra, that all appellants opted in on June 4. The result remains the same.

left. These periods elapsed even before the instant action was filed in the district court, at which time none of these appellants had filed a timely charge with the EEOC.[44] Their claims are therefore barred by the administrative statute of limitations and by the requirement that a prospective plaintiff file a timely charge of discrimination with the EEOC prior to suit in federal court. See 29 U.S.C. § 626(d) (1994).[45]

Finally, the appellants also make an alternative argument that the statute

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We reach this conclusion on the basis of an undisputed affidavit, filed by a Martin Marietta EEO officer, which states that none of three appellants filed with the EEOC before the date of the affidavit (January 17, 1995).

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Less this result seem inequitable, we note that appellants' counsel discussed Griffin v. Singletary at length in their response to Martin Marietta's motion for partial summary judgment, and relied on that opinion's adoption of the "piggybacking" rule in arguing for the inclusion of Clarke-Iley, Johnson and Shaw in the instant action. It is not inequitable to hold these appellants to Griffin's other holding; that once class certification has been denied to a piggybacking claimant, she must hie herself to the EEOC in order to seek further consideration of her claim.

of limitations should be "equitably tolled," because the EEOC told several of them (Armstrong, Cizek, Richards and Walsh) that the statute of limitations gave them two or three years in which to file suit,[46] and because the EEOC failed to notify a number of other appellants (Barger, Brooks, Budd, Carter, Giesseubel, Glaser, Havlish, Jett, McGuirk, Murphy, Prasky, Rains, Smith, Sylvestri, Turner and Williamson) that any statute of limitations applied. This argument has merit with regard to the four appellants who were affirmatively misinformed by the EEOC regarding the statute of limitations. See Browning v. AT&T Paradyne, 120 F.3d 222, 225-27 (11th Cir. 1997) (applying equitable tolling in ADEA case when EEOC affirmatively misinformed plaintiff regarding statute of limitations). We therefore hold that the ninety-day statute of limitations was equitably tolled with regard to appellants Armstrong, Cizek, Richards, and Walsh until they filed the instant action. We therefore reverse the district court's summary judgment against them and allow them to proceed.

We do not, however, accord equitable tolling to the appellants who complain that the EEOC's right-to-sue

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The EEOC was apparently relying on the pre-1991 ADEA statute of limitations. See supra note 4.

letters failed to notify them that the statute of limitations for bringing an individual claim would resume running as of the date of the letter. Appellants have cited Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984), and Gates v. Georgia-Pacific Corp., 492 F.2d 292, 295 (9th Cir. 1974), in support of the proposition that the EEOC is required to inform a complainant, in the right-to-sue letter, that the statute of limitations resumes running as of the date of the letter. If the EEOC fails to do so, the appellants have argued, then the statute should be tolled.

Even if the above-cited cases do establish that proposition, they are readily distinguished from the instant case. In Baldwin and Gates (and in Browning supra, which in dicta read Baldwin and Gates much like the appellants), the right-to-sue letter (or an analog thereto) was received long prior to the initiation of any private litigation by the claimant. The EEOC's letters to appellants Barger, Brooks, Budd, Carter, Giessuebel, Glaser, Havlish, Jett, McGuirk, Murphy, Prasky, Rains, Smith, Sylvestri, Turner and Williamson, in contrast, informed them that their EEOC complaints were being terminated because they were part of the ongoing Carmichael litigation. At the time that these appellants received notice that their EEOC complaints were being terminated, they were aware that they had claims against Martin Marietta

under the law; they were represented by counsel; and they were in fact putative class members (and in Havlish's case, a named plaintiff), in an ongoing ADEA class action. Under these circumstances, these appellants were as well-prepared to ascertain the requirements of the statute of limitations as any claimant. Equitable tolling of the limitations period with regard to these appellants would "contravene[] the normal rule that ignorance of legal rights or failure to seek legal advice does not toll the statute," Kazanzas v. Walt Disney World Co., 704 F.2d 1527, 1530 (11th Cir. 1983) (internal quotations marks and citations omitted), and is unwarranted. We therefore decline to hold that the statute of limitations was equitably tolled with regard to these appellants.

CONCLUSION

Because we hold that, in the absence of controlling authority to the contrary, statute of limitations resume running immediately upon the district court's entry of an interlocutory order denying class certification, we AFFIRM the district court's grant of summary judgment against appellants Barger, Black, Brooks, Budd, Carter, Davis, Giessuebel, Glaser, Havlish, Hinduja, Jett, Lerche, Lightner, McGuirk, McLean, Murphy, Prasky, Rains, Roberts, Ryan, Smith, Sylvestri, Turner, and Williamson.

We also AFFIRM the district court's grant of summary judgment against appellants Clarke-Iley, Johnson, and Shaw, because their claims are barred by the administrative statute of limitations and by the requirement that a prospective plaintiff file a timely charge of discrimination with the EEOC prior to suit in federal court.

Finally, we hold that the ninety-day statute of limitations was equitably tolled with regard to appellants Armstrong, Cizek, Richards, and Walsh until they filed the instant action. We therefore REVERSE the district court's summary judgment against them and REMAND the case so that they may proceed.

SO ORDERED.

EDMONDSON, Circuit Judge, concurring, in which BIRCH and BARKETT, Circuit Judges, join:

I concur in the result and in all but Part III of the court's opinion.

The question before us is whether the ADEA's statute of limitations was no longer tolled once the district court denied class certification. I agree that, although the statute of limitations is tolled while a class action is pending, the statute is no longer tolled when class certification is denied by the district court. But we need not decide such issues as the limits of the appealability (or the

likelihood of success on appeal) of a district court's denial of class certification. Therefore, while the court's discussion in Part III might be legally correct, I do not believe the discussion is necessary to decide this case. So, I do not concur in that part of today's court opinion.

HATCHETT, Chief Judge, dissenting in part, concurring in part:

I respectfully dissent in part, and concur in part. For the reasons expressed below, I would reverse the district court's ruling that 29 U.S.C. § 626(e) operates to bar the individual ADEA lawsuits of the appellants and remand for further proceedings.

In Armstrong v. Martin Marietta Corp., 93 F.3d 1505 (11th Cir. 1996), a divided panel of this court outlined three options that plaintiffs who have been dismissed from class actions may take to protect their rights to litigate their claims individually before the applicable statute of limitations runs. The court agreed to reconsider the panel's decision en banc, Armstrong v. Martin Marietta Corp, 107 F.3d 830 (11th Cir. 1997) (en banc). The principal question that brought this case en banc concerned what action ousted class members may take to protect their rights.

The Judicial Conference of the United States, through its Committee on

Rules of Practice and Procedure, has now effectively answered that question. An amendment to the Federal Rules of Civil Procedure that is currently pending details a clear procedure for avoiding an undesirable result like the one that the majority endorses today. See Proposed Fed.R.Civ.P. 23(f).[47] The proposed amendment vests in the federal appellate courts the discretion to permit an appeal from an order of a district court granting or denying class action certification if an application is made within ten days after the entry of the district court's order. Under the proposed amendment, the court of appeals and the district court would each have the discretion to stay proceedings pending the appeal--an action that would also operate to

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[47] Proposed Federal Rule of Civil Procedure 23(f) states:

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district court judge or the court of appeals so orders.

continue the tolling of any applicable statute of limitations.[48]

Of course, the proposed amendment has not yet been adopted.[49] But that

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Unlike the majority, I find no reason not to conclude that a stay necessarily tolls the applicable statute of limitations. After all, "[t]o 'stay' an order. . . means to hold it in abeyance, or refrain from enforcing it." Black's Law Dictionary 1267 (5th ed. 1979). In the abundance of caution, however, ousted plaintiffs may wish to accompany their motion to stay with a motion asserting that good cause exists for continued tolling.

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On November 12, 1997, the Judicial Conference of the United States forwarded the proposed amendment to the Supreme Court with the recommendation that the "amendment be approved by the Court and transmitted to the Congress pursuant to law." Memorandum from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 12, 1997). See 28 U.S.C. §§ 2072-74 (1994). On or before May 1, 1998, the Supreme Court will decide whether to approve the proposed rule and transmit it to Congress. See 28 U.S.C. § 2074(a). If adopted, the rule could take effect as

does not mean that the courts currently lack the supervisory authority to extend the doctrine of tolling to fashion an interim rule, so long as that rule promotes the purposes of Federal Rule of Civil Procedure 23 and does not encourage dismissed class members to "sleep[] on their rights." Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 351 (1983). In the interim, the appropriate answer to the central question before the court-- that is, whether the tolling of the ADEA's ninety-day statute of limitations due to the plaintiffs' membership in a pending class action remained tolled when the district court dismissed the plaintiffs from the pending class action in an interlocutory order -- turns on the policy considerations animating tolling in the first instance, and the interplay between those policy considerations and the purposes statutes of limitations serve.

In Crown, Cork & Seal, the Supreme Court indicated that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 462 U.S. at 349. According to the Court, tolling is appropriate when a class action is pending in order to

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early as December 1, 1998. See 28 U.S.C. § 2074(a).

protect the principal policies behind the class action procedure -- the "promotion of efficiency and economy of litigation." 462 U.S. at 349. The Court also described the purposes of statutes of limitations, indicating that "limitations periods are designed to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." 462 U.S. at 351. Such purposes, the Court indicated, are -- for two distinct reasons -- not frustrated when the class action-based tolling occurs. First, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages the class members to rely on named plaintiffs to press their claims." 462 U.S. at 352-53. Second,

> a class complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. The defendant[s] will be aware of the need to preserve evidence and witnesses respecting the claims of all members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.

462 U.S. at 353 (citations and quotation marks omitted).

Crown, Cork & Seal makes it clear that the class action complaint itself eliminates the potential for unfair surprise to defendants -- "regardless of the method class members choose to enforce their rights upon denial of class certification." 462 U.S. at 353. Accordingly, the case for continued tolling when some putative class members have been dismissed from the class turns on whether continued tolling promotes efficiency and economy of litigation without encouraging dismissed class members to sleep on their rights. Continued tolling satisfies these dual objectives in some circumstances.[50]

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I am mindful of dicta in Chardon v. Soto, 462 U.S. 650 (1983), that appears to be in tension with the conclusions I reach today. See 462 U.S. at 661 (stating that after class certification is denied, the federal interest in assuring the efficiency and economy of the class-action procedure is vindicated, as long as each unnamed plaintiff is given as much time to intervene or fie a separate action as he would have under an applicable tolling statute). The central issue in Chardon, however, was not whether should, under some circumstances, continue pending on appeal, but whether federal or state law provided the appropriate tolling rule in

Consider, for instance, the generic case -- not much unlike the case at bar -- where a district court makes an arguably erroneous interlocutory decision denying or limiting class certification. The interlocutory decision leaves a large number of putative class members in limbo -- unable to obtain an immediate appeal as of right; at least potentially out of the case; and possibly at risk of losing their claims altogether if individual lawsuits are not promptly filed. From a policy standpoint, it is far more preferable for the large number of putative class members to get a prompt appeal and possible reversal of the arguably erroneous class certification decision then it is for them to clog the legal system with a multitude of individual lawsuits filed solely to

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the case at issue. 462 U.S. at 655-62. Chardon is therefore not dispositive on the question before us today. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994) (stating that it is to the holdings of the Supreme Court, not its dicta, that courts must attend). I further note that the author of Chardon, Justice Stevens, also authored Jiminez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), which indicates that tolling continues pending appeal of a district court decision denying class certification.

preserve claims that arguably could and should be dealt with collectively. Without tolling -- at least while the putative class members seek permission to pursue an interlocutory or direct appeal -- the preferable approach will often not be taken, as the putative class members will have to file individual lawsuits in order to avoid running afoul of the appropriate statute of limitations.

Unless or until Congress enacts Proposed Rule 23(f), I would grant to plaintiffs who have been dismissed from a class action two options to pursue. First, to avoid the potential problem of litigants "sleeping on their rights," I emphasize that dismissed plaintiffs should act promptly. If dismissed plaintiffs are convinced that the district court's order denying or limiting class certification is legally unassailable, they should promptly file individual actions (or move to intervene in the named plaintiff's case) within the number of days remaining under the applicable statute of limitations period. If, on the other hand, dismissed plaintiffs are convinced that the district court's class certification order is subject to reversal on appeal as an abuse of discretion, they should promptly move for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or for a final judgment pursuant to Federal Rule of Civil Procedure 54(b) so that a direct appeal can be pursued pursuant to 28 U.S.C. § 1291. In my

view, the statute of limitations does not run for the dismissed plaintiffs during the pendency of the motion for interlocutory appeal or final judgment as the dismissed plaintiffs can in no way be said to be "sleeping on their rights," and the motion serves the interests of justice in potentially preventing the filing of unnecessary lawsuits.

The district court should, in almost every instance, grant an interlocutory appeal or enter a final judgment pursuant to rule 54(b). If the requirements for certification of an appeal pursuant to section 1292(b) are not met, it will generally be the case that "no just reason for delay" exists to preclude the entry of final judgment as to the dismissed plaintiffs. See Fed.R.Civ.P. 54(b); Brandt v. Bassett (In re Southeast Banking Corp.), 69 F.3d 1539, 1547 n.2 (11th Cir. 1995) (immediate appeal proper for some parties where hardship or injustice is thereby alleviated). Once an appeal has been authorized through either section 1292(b) or section 1291 (following the entry of final judgment pursuant to rule 54(b)), the question of tolling the applicable statute of limitations for individual claims lies with the court of appeals as a matter of equitable discretion, at least where the dismissed plaintiffs accompany their appeal with a motion asserting that good cause exists for continued tolling.

To summarize, the procedure that I would implement would require plaintiffs who have been dismissed from a class action to act promptly to protect their rights to pursue their individual claims. They must file individual lawsuits or intervene in the existing lawsuit within the applicable statute of limitations, or make a prompt effort to obtain appellate review of the denial of class certification through the procedures authorized in 28 U.S.C. §§ 1291 or 1292(b). Failure to pursue prompt appellate review, under my approach, would result in a statute of limitations time bar for any individual claims the dismissed plaintiffs may have possessed. Unlike the majority's superficially pleasing bright line, the foregoing options justly provide adequate protection to dismissed class members, discourage the filing of needless lawsuits and provide clear markers for defendants regarding the scope and duration of their potential liability.

II.

Unlike the majority, I would not retroactively impose on any of the appellants the rule announced today, whether it be the majority's or my own. The question before the court is one of first impression in this circuit. See Satterwhite v. City of Greenville, 578 F.2d 987, 997 (5th Cir. 1978) (en banc) (expressly leaving open the question of whether tolling continues until an

appellate court has affirmed the district court's order denying class certification), vacated on other grounds, 445 U.S. 940 (1980). Other courts have addressed the same question, directly or indirectly, and expressed discordant views. Some courts have effectively concluded that tolling continues until the dismissed plaintiffs have an opportunity to appeal the district court's class certification determination. See Jimenez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975) ("In this case we have no doubt that the filing of the [class action] complaint tolled the statute at least until the date of the three-judge district court decision on the merits. If that decision had expressly refused to certify the case as a class action, we think the tolling would have continued if the plaintiffs had appealed from such a ruling. . . ."), (Steven, J.), cert. denied, 427 U.S. 912 (1976).[51]

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See also West Haven Sch. Dist. v. Owens-Corning Fiberglass Corp., 721 F.Supp. 1547, 1555 (D. Conn. 1988) ("[T]here was a 'definitive determination' of the class certification no earlier than when the appeals on that issue ran their course on October 20, 1986, and until that date the statute of limitation was suspended under American Pipe rule."); Byrd v. Travenol Lab., Inc., 675 F.Supp. 342, 347 (N.D. Miss. 1987) (tolling of

Other courts appeal to have reached the opposite conclusion. See Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 390 (5th Cir.) (per curiam) (holding that the statute of limitations begins to run again upon the district court's original denial of class certification, even if the district court later reconsiders the issue and certifies a class), cert. denied, 493 U.S. 821 (1989).[52]

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statute of limitations ended when appeal involving denial off class certification had run its course, i.e., on the date the Supreme Court denied certiorari); Davis v. Bethlehem Steel Corp., 660 F.Supp. 1312, 1316 (D.Md.), aff'd, 769 F.2d 210 (4th Cir.), cert. denied, 474 U.S. 1021 (1985); American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 762 (Utah 1992) ("We agree with the federal interpretations and conclude as a matter of Utah law that when a proper appeal of a class certification decision is taken, the tolling benefit continues on behalf of all members of the class until the class issue is finally determined by the decision on appeal.").

[52] Supportive language for the view endorsed in Calderon can also be found in the following cases: Nelson v. County of Allegheny, 860 F.Supp. 1080, 1084 (W.D. Pa. 1994), aff'd, 60 F.3d 1010 (3d Cir. 1995), cert. denied, 116 S.Ct. 1266 (1996); Chardon v. Soto, 462

Given the ambiguous state of the law when the appellants in this case were dismissed from the Carmichael class action, they urge that the new rule should not be applied to them. The appellees, of course, urge that it should. Although recognizing that it is a close call, I would allow the appellants to continue pursuing their individual claims even though those claims would otherwise be barred under either the majority's rule or my proposed one.

As this court recently stated in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 513 U.S. 1110 (1995), the Supreme Court has established a three-factor test for determining whether to apply a newly announced non-criminal decision retroactively, prospectively or selectively prospectively. 20 F.3d at 1565 (citing Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)).

> First, the decision must announce a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression the resolution of which

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U.S. 650 (1983); Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); and American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

> was not clearly foreshadowed. Second, the application of the old rule in the instant case must not contravene the purpose and operation of the provision being interpreted. And, third, application of the new rule in the instant case must be inequitable.

McKinney, 20 F.3d at 1565.

In the past, the court has concentrated on the potential inequity to the plaintiff in assessing the third factor, McKinney, 20 F.3d at 1566. Here, the inequity to the appellants is clear: their individual claims are extinguished without review of the district court's decision dismissing them from the Carmichael class action, even though they were without clear guidance on the proper route to pursue for relief. I also note the minimal prejudice to the appellees in allowing the appellants to proceed individually. The appellants in this case ultimately brought individual lawsuits only three months after the statute of limitations would have expired if tolling commenced immediately following the district court's interlocutory order. Accordingly, it is unlikely that the appellees experienced any significant prejudice in this case in terms of lost evidence, fading memories and disappearing witnesses. The minimal prejudice to the appellees is also apparent from the fact that the class complaint in the Carmichael case

notified the defendants of the substative claims, number and specific identities of these parties. Cf. Crown, Cork & Seal, 462 U.S. at 354-55 (Powell, Rehnquist & O'Connor, JJ., concurring) (when the defendant has been notified of the subject matter and size of the prospective litigation, "the defendant normally is not prejudiced by tolling of the statute of limitations"). I therefore find that the third Chevron Oil factor is satisfied in this case.

Although it is a closer question, I also find that the first Chevron Oil factor is satisfied, because the court resolves an issue of first impression the resolution of which was not clearly foreshadowed in light of the discordant case law cited above and our express reservation of this issue in Satterwhite. Finally, I find that the second Chevron Oil factor is satisfied in light of the fact that the appellants in this case did not sleep on their rights in the face of clear contrary binding precedent.

Accordingly, because I would reverse the judgment of the district court in its entirety and remand for further proceedings, I dissent from the majority's affirmance as to appellants Barger, Black, Brooks, Budd, Carter, Davis, Giessuebel, Glaser, Havlish, Hinduja, Jett, Lerche, Lightner, McGuirk, McLean, Murphy, Prasky, Rains, Roberts, Ryan, Smith, Sylvestri, Turner and Williamson, in addition to

appellants Clarke-Iley, Johnson and Shaw. I specially concur in the majority's reversal as to appellants Armstrong, Cizek, Richards and Walsh.

(2)

No. 98-552

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

DAVID M. ARMSTRONG, *et al.*,

Petitioners,

vs.

MARTIN MARIETTA CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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35 pp

QUESTION PRESENTED

Whether the en banc appellate court correctly applied 29 U.S.C. §§ 626(d) and (e) in holding the statute of limitations begins to run again for a putative plaintiff dismissed from a 28 U.S.C. § 216(b) Age Discrimination in Employment Act ("ADEA") class or representative action, immediately upon the district court's entry of the interlocutory order denying class certification.

LIST OF INTERESTED PARTIES

The Respondents in this action are Martin Marietta Corporation and Martin Marietta Technologies, Inc., which merged and reorganized subsequent to this action and are now known as Lockheed Martin Corporation.

In addition, pursuant to Supreme Court Rule 29.6, the following are nonwholly owned subsidiaries of Lockheed Martin Corporation:

2142040 CANADA
AEROPLEX OF CENTRAL EUROPE, LTD.
AESYS, LLC
AGI CHINA (M) LIMITED
AIRPORT GROUP AUSTRALIA LIMITED
AIRPORT GROUP CANADA, INC.
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AIRPORT GROUP INTERNATIONAL GMBH
AIRPORT GROUP INTERNATIONAL HOLDINGS, LLC
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AIRPORT GROUP INTERNATIONAL MANAGEMENT S.A.
AIRPORT GROUP INTERNATIONAL, INC.
AIRPORT GROUP NEW ZEALAND LIMITED
AIRPORT GROUP PACIFIC DEVELOPMENT (L) LIMITED
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AIRSTRALIA DEVELOPMENT GROUP PTY LTD.
ALLIANCE EMIRATES DEVELOPMENT COMPANY, LLC
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TUREBERGSVAGEN 11A
CALCOMP A/S
CALCOMP ASIA/PACIFIC LTD.
CALCOMP AUSTRALIA PTY LTD.
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CALCOMP TECHNOLOGY, INC.
COALITION UNDERTAKING REMEDIAL EFFORTS, INC.
DANISH AEROTECH A/S
EARTH OBSERVATION SATELLITE COMPANY
ELECTRO-OPTICAS SUPERIOR SA DE CV
EO SYSTEMS INTERNATIONAL, LTD.
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L3 COMMUNICATIONS HOLDINGS, INC.
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LOCKHEED AIRCRAFT SERVICE-OVERSEAS
LOCKHEED INTERNATIONAL LIMITED TAIWAN
LOCKHEED INVESTMENT HOLDING CO., A.S.
LOCKHEED KHRUNICHEV ENERGIA
INTERNATIONAL, INC.
LOCKHEED MARTIN AUSTRALIA PTY LIMITED
LOCKHEED MARTIN CANADA, INC.
LOCKHEED MARTIN CHEMICAL
DEMILITARIZATION SYSTEMS, LLC
LOCKHEED MARTIN ENERGY TECHNOLOGIES,
INC.
LOCKHEED MARTIN GMBH
LOCKHEED MARTIN IMS (UK) LIMITED
LOCKHEED MARTIN INTERNATIONAL LIMITED
LOCKHEED MARTIN INTERNATIONAL, SA
LOCKHEED MARTIN INTERSPUTNIK, LTD
LOCKHEED MARTIN SECURITIES, INC.
LOCKHEED MARTIN YATIRIM HOLDING, A.S.
LOCKHEED MIDDLE EAST SERVICES
LONGBOW LLC
LORAL MIDDLE EAST COMMUNICATIONS, LTD.
LORAL SPACE & COMMUNICATIONS LTD

MARTIN MARIETTA AUSTRALIA PTY LTD
MARTIN MARIETTA EO ASSOCIATES (EUROPE), INC.
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MIKRODALGA ELEKTRONIK SISTEMLER SANAYI VE TICARET A.S.
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NEW CURE, INC.
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NV CALCOMP, SA
OPTIMUS LOCKHEED MARTIN INFORMATION TECHNOLOGY GROUP (OLMITG)
PACIFIC AEROSPACE CORPORATION LIMITED
PDES, INC.
PGM SYSTEMS, LIMITED
PGSUS, LLC
RADARSAT INTERNATIONAL, INC.
RATIONAL SOFTWARE CORPORATION
REAL 3D, INC.
RLM HOLDINGS PTY LTD
RLM MANAGEMENT PTY LTD
RLM SYSTEMS PTY LTD
RLM TECHNOLOGIES PTY LTD
SATCO (ASIA), LLC
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SATPHONE TELECOMMUNICATIONS SERVICES LTD.
SERVICIOS TECNICOS LOCKHEED MARTIN DE MEXICO, SA DE CV

SIKA INTRNATIONAL LIMITED
SKY SOLUTIONS (UK) ltd.
SOFTWARE PRODUCTIVITY CONSORTIUM, INC.
SPACE IMAGING L.P.
SPACE IMAGING, INC.
TEAM APACHE SYSTEMS, LLC
TI/MARTIN JAVELIN JOINT VENTURE
TOSHIBA ELECTRONIC SYSTEMS CO., LTD
TRISTAR PARTS, LTD
TUSAS AEROSPACE INDUSTRIES, INC.
UNITED SPACE ALLIANCE, LLC
VALLEY ASSOCIATION CORPORATION
VENTURESTAR, LLC
WESTERN AUSTRALIA AIRPORT DEVELOPMENT (L) LIMITED
WESTERN INVESTOR TECHNOLOGY GROUP, LP
WESTRALIA AIRPORTS CORPORATION PTY LTD
WITG, INC.

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OPINIONS BELOW

Respondents adopt the summary of the opinions below contained in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents adopt the statement of jurisdiction contained in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS AND RULES INVOLVED

29 U.S.C. § 626(e) of the Age Discrimination in Employment Act:

> **(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice**
>
> Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in § 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

29 U.S.C. § 626(d) of the Age Discrimination in Employment Act

> **(d) Filing of charge with secretary; timeliness; conciliation, conference, and persuasion.**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed . . .

(2) in a case to which § 14(b) [29 U.S.C. § 633(b)] applies; within 300 days after the alleged unlawful practice occurred . . .

28 U.S.C. § 1292(b):

§ 1292. Interlocutory decisions.

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Federal Rule of Civil Procedure 59(e):

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 54(b):

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

A. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, Respondents bring to the Court's attention the following misstatements of facts contained in the Petition.

Petitioners misrepresent to this Court that there are still thirty-three Petitioners in this appeal. (Petition, List of Parties, at ii). Named Petitioners Myrtle Y. Redding and Marlon K. Tarter were dismissed from this appeal by joint stipulation of the parties while it was pending before the Eleventh Circuit, reducing the number of appellants covered by the Eleventh Circuit's en banc opinion to thirty-one. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998).

Moreover, the Eleventh Circuit's en banc opinion affirmed the district court's granting of summary judgment only as to twenty-seven of the appellants. The en banc court reversed the decision of the district court as to four appellants — David M. Armstrong, Dominick C. Cizek, Kenneth A. Richards, and Edward W. Walsh — on the grounds of equitable tolling, because the Equal Employment Opportunities Commission (EEOC) misinformed them about the applicable statute of limitations. *Armstrong, Id.* at 1394. Therefore, named Petitioners Armstrong, Cizek, Richards and Walsh, whose individual claims were remanded by the Eleventh Circuit, en banc, and are pending before the Middle District of Florida, Case Nos. 98-752-CIV-ORL-18B, 98-753-CIV-ORL-18B, 98-754-CIV-ORL-18C, and 98-755-Civ-ORL-18C, respectively, should never have been named as Petitioners in this action.

Petitioners thus parties to this action are: L. Benson Barger, Wallace D. Black, Howard Brooks, Jerry A. Budd, Sonja M. Carter, Carol D. Clark-Iley, Charles H. Davis, Kenneth O. Giessuebel, Herold P. Glaser, Robert A. Havlish, Kumar Hinduja, Joseph C. Jett, Glenn E. Johnson, Robert C. Lerche, Calvin M. Lightner, George W. McGuirk, James W. McLean, William G. Murphy, Donald L. Prasky, Clark C. Rains, Russell G. Roberts, Linda L. Ryan, Victor W. Shaw, Linton W. Smith, Michael Sylvestri, Delbert S. Turner, and Joseph W. Williamson.

B. Course of Proceedings and Disposition of the Case Below

Four of the subject Petitioners[1], Charles H. Davis, Robert A. Havlish, Kumar Hinduja, and Linton W. Smith, were among

---

1. In their Petition for Writ of Certiorari, Petitioners misrepresent the status of these four plaintiffs in the *Carmichael* representative action, lumping them together with the twenty-four Petitioners who opted into that action. (Petition, at 4).

twenty-three original named plaintiffs in a representative action filed in the United States District Court, Middle District of Florida, pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-634. *Carmichael v. Martin Martietta Corp.*, Appeal Case No. 96-2706 (*Carmichael* R1-1). The remaining twenty-three subject Petitioners opted into the lawsuit pursuant to 29 U.S.C. § 626(b), incorporating by reference 29 U.S.C. § 216(b) of the Fair Labor Standards Act.

On April 7, 1994, the district court certified a *Carmichael* class of similarly situated individuals. Individuals who were not similarly situated, including Petitioners, were dismissed without prejudice from the representative action. At that point, they had a range of options, including appealing their dismissal from *Carmichael* or filing individual actions. Rather than requesting the court to reconsider the *Carmichael* certification order, to certify it for interlocutory appeal, or to enter a final judgment at that time for purposes of appeal, Petitioners elected to file the underlying joinder action of their individual claims. *Armstrong v. Martin Marietta Corp.* (R1-1). The *Armstrong* joinder action, filed in the Middle District of Florida on October 11, 1994, was comprised of forty-six individual claims. It contained the same age discrimination allegations, and was based on the same alleged facts, as those made in the *Carmichael* representative action. (*Carmichael* R1-1; R1-1).

On April 5, 1995, the district court granted partial summary judgment[2] against those claimants who had been dismissed from the *Carmichael* representative action (including the twenty-seven subject Petitioners), endorsing a March 22, 1995

---

2. Thirteen *Armstrong* plaintiffs had not been part of the *Carmichael* class action and were thus unaffected by the Court's partial summary judgment order. Therefore, on May 10, 1998, the Court severed the remaining thirteen cases, which were since litigated as individual lawsuits and resolved.

recommended order by the United States Magistrate, holding that the claimants had failed to file their individual claims within the 90-day notice period required by 29 U.S.C. § 626(e). (R2-24-2,7,8; Petitioners' Appendix, A-1).

Petitioners moved for entry of final judgment under Federal Rule of Civil Procedure 54(b) as to the dismissed plaintiffs, and the *Armstrong* court entered judgment on September 14, 1995. (R2-29, 30). Petitioners' notice of appeal of their dismissals was filed on September 25, 1995. (R2-31).

The Eleventh Circuit Court of Appeals reversed on September 11, 1996. *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996), *vacated en banc,* 138 F.3d 1374. The panel agreed that the 90-day statute of limitations in discrimination cases is tolled while putative plaintiffs are members of a class, but held that when tolling ceased depended upon what course of action a putative plaintiff took following his dismissal from the class. The panel held that, if the dismissed putative class member did not pursue an interlocutory appeal or appeal the final judgment, tolling ceased upon entry of the dismissal order, and an individual action had to be filed within 90 days of the order dismissing him from the class. However, if a timely interlocutory appeal of the dismissal order was filed, tolling did not cease until the interlocutory appeal was denied; and if the final judgment of the class determination was timely appealed, tolling did not cease until the appeal was denied. *Id.* at 1509. Because Petitioners did not file an interlocutory appeal and filed their individual claims before final judgment was entered but after the expiration of the 90-day limitations period from the date of the *Carmichael* dismissal order, the panel determined they filed their individual actions in *Armstrong* untimely. However, the panel decided not to apply its ruling retroactively, and reversed summary judgment against Petitioners. *Id.* at 1510. A strong dissent preferred a bright line

rule that the statute of limitations resumes running once the claimant is dismissed from the class. *Id.* at 1513.

Respondents subsequently filed a Suggestion of Hearing En Banc, and the Eleventh Circuit granted en banc review.

The Eleventh Circuit, sitting en banc, reversed and vacated the panel decision, affirming the district court's order granting summary judgment for the twenty-seven subject Petitioners. *Armstrong, supra,* at 1394 (11th Cir. 1998). The en banc court followed Supreme Court precedent and held the tolling of the statute of limitations ceased once Petitioners were dismissed from the class. *Id.* at 1391. The court opined that once they were no longer members of the class Petitioners could no longer rely on the class to protect their interests. *Id.* at 1384.

Thus, the twenty-four Petitioners who failed to file their individual lawsuits within 90 days of the class certification order were barred by the 90-day limitations period. In addition, three Petitioners[3], Carol D. Clark-Iley, Glenn E. Johnson, and Victor W. Shaw, had not filed individual EEOC charges before piggybacking onto the *Carmichael* timely-filed EEOC "class" charge, and they failed to file their EEOC claims within the time period remaining on their 300-day administrative charge-filing period after the class certification decision. Thus the en banc court affirmed summary judgment as to Clark-Iley, Johnson and Shaw, because their claims were barred by the administrative statute of limitations and by the requirement that a prospective plaintiff file a timely charge of discrimination with the EEOC prior to suit in federal court. *Armstrong, supra,* at 1394.

---

3. In their Petition for Writ of Certiorari, Petitioners misrepresent the basis for the affirmance of summary judgment as to these three Petitioners, lumping them together with the twenty-four Petitioners who failed to file their lawsuits within 90 days of the class certification decision. (Petition, at 8).

In so doing, the en banc court pointed out that allowing Petitioners to wait to bring their individual claims until the *Carmichael* class had fully litigated its claim and exhausted its appeal would contravene important policy considerations behind statutes of limitations. *Id.* at 1380, 1388-1389.

REASONS FOR DENYING THE WRIT

I.

THE EN BANC DECISION APPLIES SUPREME COURT PRECEDENT IN AFFIRMING SUMMARY JUDGMENT AGAINST PETITIONERS.

This Court should deny the Petition for Writ of Certiorari because, in affirming the district court ruling granting summary judgment against the twenty-seven subject Petitioners, the Eleventh Circuit followed the statute of limitations tolling rule for class actions articulated by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and then in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Therefore, the court below cannot be said to have

> so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Supreme Court Rule 10(a).

American Pipe held the filing of a class action tolled the statute of limitations only until the court denied class certification. *American Pipe*, 414 U.S. at 561. *American Pipe* involved a class action antitrust complaint filed with just eleven days remaining before the limitations period expired. Several

months later, the district court denied class certification. *Id.* at 541-543. Eight days after the order denying class certification was entered, several state and local agencies that had been putative class members moved to intervene in the action and become plaintiffs. *Id.* at 543-544. This Court, in allowing them to intervene, held

> . . . that commencement of the class action in this case suspended the running of the limitations period *only during the pendency of the motion to strip the suit of its class action character.* The class suit . . . was filed with eleven days yet to run in the [limitations] period . . . and the intervenors thus had eleven days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of [the] order, it follows that the motions were timely.

Id. at 561 (emphasis added).

The rule established in *American Pipe* was extended in *Crown, Cork,* a race discrimination class action, to former putative class members filing individual lawsuits. In *Crown, Cork*, the plaintiff filed a timely EEOC charge alleging race discrimination (as did all but three Petitioners in this case), and then became a member of the class action while the charge was pending. Subsequently, the plaintiff received a right-to-sue notice from the EEOC. After he received his notice, the federal court denied class certification. The plaintiff then filed an individual Title VII lawsuit. This Court held that since the plaintiff had not received his right-to-sue notice until after the class action was filed, he retained the full 90 days in which to bring his individual suit after class certification was denied.

This Court concluded that the commencement of a class action suspends or tolls the limitations period for all asserted members of the class "until class certification is denied." *Crown, Cork, supra,* at 354. At that point, class members have the option of filing individual suits or intervening as plaintiffs as long as "those actions are instituted within the time that remains on the limitations period." *Id.* at 347.

Petitioners attempt to distinguish Supreme Court precedent by arguing that *Crown, Cork* and *American Pipe* involve Rule 23 class actions, not a representative action brought pursuant to the ADEA. Even though these Supreme Court cases involve Rule 23 rather than § 216(b) classes, the key principle remains the same: tolling of the statute of limitations ends with the order determining class or representative status and/or participation, not with a later final judgment or still later appeal. This principle applies regardless of the type of class involved or whether class certification was granted or denied. This Court never has held that the statute of limitations remains tolled for individuals dismissed from the class until a final judgment is entered for the remaining class members or the class exhausts its appeals.

The en banc court had additional authority for its tolling rule from *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), which held that although the 300-day period for filing charges with the EEOC was tolled as long as the plaintiffs were members of a class, it began running once the certification order was vacated, since the individuals could then no longer rely on the class to protect their rights. *Id.* at 360.

Other circuits, as pointed out in the en banc decision below, have also rejected the contention that tolling extends beyond the denial of class certification, through final judgment and the exhaustion of all appeals. The Third Circuit in *Nelson v. County of Allegheny*, 60 F.3d 1010 (3d Cir. 1995), held that

tolling ends when class certification is denied. The court concluded that

> to permit tolling of the statute of limitations until final resolution on appeal of all claims would disable the essential purpose of the statute and encourage plaintiffs to sleep on their rights.

Id. at 1013.

The en banc court in the instant case recognized the essential policies behind statutes of limitations and their importance to the fairness and efficiency of the judicial system. The court held that "continuing to toll the statute of limitations through trial and through the entire appeals process would seriously contravene the policies underlying statutes of limitations." *Armstrong, supra,* at 1388. Statutes of limitations are intended to prevent " 'the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " *Id.* citing Order of *R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-349. The court recognized that the rule proposed by Petitioners "would leave cases in limbo for years at a time" and would prejudice defendants. *Id.* at 1388. Age discrimination cases are especially susceptible to this problem since many witnesses or parties are at or near retirement age when the litigation commences. *Id.* at n.31.

Given, as the en banc court noted below, that *Crown, Cork* held or impl[ied] strongly, "that tolling of the statute of limitations ends upon the district court's denial of class certification," the en banc decision cannot possibly be held to have departed from the accepted and usual course of judicial proceedings sufficiently enough to call for review by this Court. *Id.* at 1382.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE.

The Petition for Certiorari should likewise be denied because the Eleventh Circuit's en banc decision is "not in conflict with another United States Court of Appeals on the same important matter." Supreme Court Rule 10(a). Any perceived conflict among the circuits was resolved years ago by this Court, first in *American Pipe*, and then in *Crown, Cork*. The legal principle that tolling of a statute of limitations ceases once claimants are dismissed from a class is so clearly established the en banc court referred to it as "the *Crown, Cork* rule." *Id.* at 1382 n.14.

All federal appeals courts that have ruled on this issue since *Crown, Cork* have followed or affirmed this rule. *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Nelson v. County of Allegheny, supra*; *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989); *Andrews v. Orr*, 851 F.2d 146, 149-150 (6th Cir. 1988). The First Circuit ruled that way before *Crown, Cork* in *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982).

The so-called conflict cited by Petitioners arises from *Jimenez v. Weinberger*, 523 F.2d 698 (7th Cir. 1975). However, this opinion was issued eight years before *Crown, Cork*, and, insofar as it conflicts, can no longer be considered a valid statement of federal law.

In addition to lacking controlling authority, *Jimenez* is factually distinguishable from the instant case. *Jimenez* involved a constitutional challenge to the Social Security Act's proviso making illegitimate children born after disability of their parents

ineligible for benefits. The complaint sought both individual and class relief. A three-judge court sustained constitutionality of the statute without considering the class action issue, and the Supreme Court reversed on the merits without making any reference to it. The district court, on remand, granted classwide relief to 7,000 unnamed claimants. The issue before the Seventh Circuit on appeal was whether the timely filing of the suit by the named plaintiffs satisfied the 60-day statute of limitations requirement for the entire class. The Seventh Circuit held that, because no court had previously ruled on the class action issue, "... the class claims [over which the court had acquired jurisdiction when the complaint was filed] continued to pend and the statute of limitations did not run." *Id.* at 696.

Jimenez thus does not support Petitioner's assertion that the statute of limitations tolls on behalf of the dismissed putative plaintiffs until the remaining class claim is fully litigated and all its appeals exhausted. Although the Seventh Circuit speculated in dicta that the statute of limitations might continue to toll after an adverse class determination if the plaintiffs appealed the issue, the court fell far short of adopting that reasoning as the basis for its decision; ruling instead, as previously discussed, that no tolling issue arose because no adverse class determination was ever made. Therefore, *Jimenez* does not present a conflict among circuits on the tolling issue and does not warrant this Court's granting of Petitioners' request for certiorari in this case.

The other case cited by Petitioners, *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992), was recited by the en banc court only to point out that the Utah court "misread federal law." Because *American Tierra* is not a federal circuit court and because, as the en banc court below noted, it offered no rationale for its holding (which it based on *Jimenez* without discussing those circuit court cases decided after

Crown, Cork, e.g., *Calderon*, *Andrews*, or *Fernandez*), it provides no authority in support of Petitioners' Petition for Certiorari and is not worth further analysis.

III.

RULE 54(b) DOES NOT INDEFINITELY TOLL STATUTE OF LIMITATIONS FOR NON-CLASS MEMBERS.

The question framed by the en banc court in this case was

> whether, in the absence of controlling authority, the statute of limitations begins to run again immediately upon the district court's entry of the interlocutory order denying class certification, or *whether the statute remains tolled through final judgment in the former class action and completion of an appeal from the order denying class certification.*

Armstrong, supra, at 1378 (emphasis added). Petitioners' allegation on p. 10 of their Petition that "the en banc court refus[ed] to address petitioners' [Rule 54(b)] argument" is thus absurd. The en banc court thoroughly considered Petitioners' argument, and concluded that the interpretation of Rule 54(b) Petitioners seek is patently unreasonable and seriously contravenes the policies underlying statutes of limitations.

The en banc court pointed out that "the purpose of [such] tolling is to encourage class members to reasonably rely on the class action to protect their rights." *Id.* at 1380. Once dismissed, claimants are no longer members of the class, and can no longer be considered parties protected by the tolling rules. Their interests are no longer the same as those of the class. It is not

reasonable for dismissed putative class members to rely on the protections of a class to which they do not belong. Once removed from the class, it is reasonable to expect them to act on their rights.

The en banc court specifically addressed Petitioners' argument that the statute of limitations should continue to be tolled because the interlocutory order denying certification (or, in this instance dismissing them from the certified class) might be later reversed by the district court or by the court of appeals upon interlocutory review or after final judgment. Although the en banc court agreed that the certification decision could be reviewed in any of these ways, and, in addition, through the possibility of mandamus review (". . . in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion," circumstances which the court stated were not presented in this case), because the standards of review/reversal are so difficult to meet, the court said "no reasonable person would rely on the hope that either the district court or this court might someday determine that the suit should have proceeded as a class action." *Armstrong, Id.* at 1381, 1385-1386.

Petitioners attempt to disparage the en banc court's logical analysis by labeling it "The Three Percent Rule." While the phrase may ring like a tabloid headline, it does nothing more than attempt to refute sound legal analysis with the equivalent of a TV news sound bite. The en banc court in fact adopted no such rule or standard; it merely pointed out that the chances of a trial court reversing a decision on class certification are extremely slim. The court cited empirical studies showing reconsideration of class certification decisions were granted in less than three percent of all cases. *Id.* at 1381, n.12. This is hardly a judicial standard; rather, it is a fact which gives support to a conclusion. Moreover, Petitioners' argument rings

particularly hollow, given their failure to request that the district court reconsider its class certification order.

In fact, Petitioners failed to exercise any of the options available to them for review of the district court's certification order in *Carmichael* prior to filing their individual suit(s) in *Armstrong*, i.e., they failed to file a Motion for Reconsideration or Relief pursuant to Fed. R. Civ. P. 59(e); they failed to file an interlocutory appeal pursuant to 29 U.S.C. § 1292(b)[4] and they failed to move the court under Rule 54(b) to enter a final judgment and to certify there was no just cause to delay their appeal. Instead, they abandoned their *Carmichael* class claim and filed their individual actions in *Armstrong* involving literally the same claims, containing the same facts and the same legal issues — at the same time. These multiple actions are exactly what the tolling rule was designed to avoid. In addition, if the time period for filing individual actions did not begin to run until the entry of a 54(b) final judgment, or until the *Carmichael* appeal is exhausted, as Petitioners argue, then Petitioners' individual claims in this case were filed prematurely. Petitioners cannot argue the *Carmichael* certification order was final for purposes of filing their individual actions in *Armstrong*, but was not final for purposes of the statute of limitations.

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4. The appeal of class certification orders will become a quicker and easier process if Congress approves changes in Rule 23. A proposed section (f), already approved by this Court, authorizes appeals of class certification orders, which now are interlocutory, if made within ten days. Although the Rule 23 change would not automatically apply to § 216(b) representative actions, courts look to Rule 23 caselaw in deciding issues regarding § 216(b) cases. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995). Thus the proposed Rule 23(f) would be given "great weight" in determining whether an interlocutory appeal of a § 216(b) class determination was authorized.

The court further concluded Petitioners' misinterpretation of Rule 54(b) was unreasonable because to allow the statute of limitations to toll through trial and all appeals would seriously undermine the policies on which statutes of limitations are based. In ADEA representative action cases, it would extend for a dismissed putative class member the 90-day deadline for filing suit (or the 300-day deadline for filing an administrative charge) for an undefined period — generally several years. It would be unfair to parties and poor public policy to give a former putative class member years after his dismissal from a representative action to file a lawsuit (or administrative charge), while allowing an individual plaintiff who never opted into a representative action only 90 days to file suit (or 300 days to file his administrative charge).

Referencing this Court's analysis in *American Pipe*, the en banc court noted that to allow a dismissed putative class member to wait until final judgment on the merits of a class action before determining whether participation in the class (rather than pursuing his individual action) was in his best interest would allow him to unjustly "... benefit from a favorable judgment without subjecting [himself] to the binding effect of an unfavorable one." *Armstrong, supra,* at 1389, citing *American Pipe, supra,* at 547.

Further, as the en banc court noted, it would encourage plaintiffs' attorneys to load classes with large numbers of individuals, regardless of how dissimilar and how improper their membership, to shield them from statutes of limitations for long periods of time. It would likewise force defendants to forego meritorious defenses to class certification and instead litigate all putative class claims in the class case (just to avoid the uncertainty of not knowing when their exposure to claims of putative class members would end). The result would be an

> unnecessary — and perhaps an intolerable — tax on the judiciary, as courts are forced to preside over large class actions as to which a meritorious defense exists but has not been profferred.

Armstrong, supra, at 1389. For these reasons, the en banc court concluded that the federal interest in encouraging reliance on the class mechanism *after* denial of certification is "virtually non-existent." *Id.* at 1385.

Finally, there are no class or representative action cases which support Petitioners' mistaken assertion that, because a dismissed putative class member may wait until a final judgment is entered to appeal his dismissal from a representative action, Rule 54(b) also requires tolling of his individual statute of limitations during that entire time. All of the cases cited by Petitioners involve individual actions filed after dismissal from a class action.

The issue in *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979), was whether the plaintiff in an antitrust suit could appeal the dismissal of one of several defendants. The court held the order was not final for appeal purposes until summary judgment and a final judgment was entered on behalf of the other defendants. *Id.* at 1370 n.2. *Ansam Associates, Inc., v. Cola Petroleum, Ltd.*, 760 F.2d 442, 445-446 (2d Cir. 1985), involved the issue of whether dismissed claims could be considered on appeal and whether the order was a 54(b) final judgment. The third case cited by Petitioners, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 31 (D.C. Cir. 1990), involved the issue of whether an appeal of a 54(b) final judgment could include a prior ruling of one of several defendants. The opinion discussed whether a final judgment must be on a document separate from the court opinion or order. *Id.* at 32.

Therefore, as the en banc court correctly concluded, Rule 54(b) does not extend tolling of the statute of limitations for dismissed putative class members through final judgment in the class action and completion of all appeals therefrom.

IV.

A SECTION 216(b) REPRESENTATIVE ACTION IS A CLASS ACTION.

Petitioners mistakenly argue the jurisprudence of the tolling of the statute of limitations in class actions established by this Court is not applicable because Petitioners' ADEA representative action brought in *Carmichael* was not a Fed. R. Civ. P. 23 class action. They thus argue the precedent established by this Court for putative plaintiffs in class actions should not be applied to this case. The argument ignores the fact that a representative action is a type of class action, even though it has certain characteristics which distinguish it from a Rule 23 class action. Courts typically look to Rule 23 class actions to provide guidance in analyzing representative actions. *Mooney*, *supra,* at 1212.

A representative action under § 216(b) is neither a pure Rule 23 class action nor a Rule 20 joinder action. Rather, it is a hybrid with its own unique characteristics. It shares some traits of both while maintaining a separate and distinct identity. The primary distinction is that claimants are required to affirmatively opt into a § 216(b) representative action, and are not included in the class unless they do so. In Rule 23 actions, the court certifies a class and notice is given to members, who remain in the class unless they opt out. These distinctions were recognized by the Eleventh Circuit as well as by the district court below.

A representative action possesses the class traits of allowing claims to proceed on behalf of others similarly-situated and of allowing class members to "piggyback" on the class administrative charge(s) filed by class member(s). In so doing, claimants face the risk that the class may not be certified, or if it is certified, that they will be excluded for failing to meet the similarly-situated requirement and be subject again to the statute of limitations.

Petitioners mischaracterize an ADEA representative action as nothing more than a joinder of individual claims or parties with no class characteristics. No authority in statutes or case law supports this description. ADEA class actions brought under § 216(b) have different characteristics than Rule 20 joinder actions. By definition, the two are "mutually exclusive." *Flavel v. Svedala Industries, Inc.*, 875 F. Supp. 550, 553 (E.D. Wis. 1994). The two different actions have different standards for plaintiffs. The more difficult joinder standard allows multiple claims to be joined if they arise out of the same transaction or occurrence and contain common questions of law or fact. *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996).

Petitioners are former putative plaintiffs in *Carmichael*, which was litigated for two years as an ADEA representative or "class" action. The original and amended complaints in *Carmichael* state the case was brought pursuant to § 216(b) as a representative action on behalf of a class of "similarly situated" individuals. (*Carmichael* R1-1; R2-83). Nowhere was it pled in *Carmichael* (as it was later in *Armstrong)* that plaintiffs were proceeding as a joinder action under authority of Rule 20. (*Carmichael* R1-1; R2-83; R1-1). The twenty-three subject Petitioners who opted into *Carmichael* followed the opt-in procedures of § 216(b). (*Carmichael* R1-3 to 6, R1-48 to 57, R2-58 to 64, R2-68 to 81; R2-84 to 167). Members of the class who did not timely file EEOC charges were able to

piggyback on the administrative compliance of other class members, a feature unique to class actions, and when they were dismissed from the *Carmichael* representative action, had to timely file their own individual administrative charges of discrimination. *Griffin v. Singletary, supra,* at 359-61 (11th Cir. 1964); *Armstrong, supra,* at 1392-1393. Prior to trial, *Carmichael* plaintiffs fought to maintain their class status by vigorously opposing Respondents' motion to decertify the class, arguing it was not a case to which the permissive joinder requirements of Fed. R. Civ. P. 20(a) applied. Now, after litigating *Carmichael* as a class in district court, Petitioners make the opposite argument, and claim this class action was really a joinder case all along.

The action brought in *Carmichael* under § 216(b) cannot be a joinder action merely because every individual was a named plaintiff who affirmatively opted into the case. Putative members opted into the case because it was mandated by § 216(b). Respondents agree an ADEA representative action is not the same as a Rule 23 class. Nonetheless, it is a class. It is simply a different kind of class, created specifically for age discrimination claims.

The courts below were well aware of the differences between § 216(b) and Rule 23 class actions. None of the courts below ever treated this case as a Rule 23 class. The en banc court cited *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975), which explains the fundamental differences between the two types of classes. None of the courts below ever mischaracterized the *Carmichael* class. Petitioners, however, mischaracterize it when they attempt to treat this § 216(b) class as a joinder action.

CONCLUSION

Because the Eleventh Circuit, sitting en banc, did not so far depart "from the accepted or usual course of judicial proceedings, or sanction such a departure by a lower court" as to require the exercise of this Court's supervisory power, and because the decision does not conflict with another U.S. Circuit Court of Appeals on an important matter, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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